83-222

FILED

AUG 9 1983

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

BORMAN'S INC.,
Petitioner,

vs.

ALLIED SUPERMARKETS, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BARRIS, SOTT, DENN & DRIKER
By: Donald E. Barris
Eugene Driker *(Counsel of record)*
Elaine Fieldman
Attorneys for Petitioner
Business Address:
2100 First Federal Building
1001 Woodward Avenue
Detroit, Michigan 48226
(313) 965-9725

AMERICAN PRINTING COMPANY
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

In the Supreme Court of the United States

OCTOBER TERM, 1983

BORMAN'S INC.,
Petitioner,

vs.

ALLIED SUPERMARKETS INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Borman's Inc., by its attorneys, Barris, Sott, Denn & Driker, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

QUESTIONS PRESENTED

1. May a bankruptcy court in Chapter 11 proceedings authorize rejection of a multi-employer collective bargaining agreement under the business judgment test which the federal courts have uniformly held to be inapplicable to rejection of labor contracts?

2. Should a judgment be permitted to stand where the judge engages in extrajudicial conduct in aid of one of the litigants directly relating to the case before him?

PARTIES

In addition to the parties listed in the caption, Locals 876, 36 and 539 of the United Food and Commercial Workers International Union (the successor to the merged Retail Clerks International Union and the Amalgamated Meat Cutters and Butcher Workmen of North America) ("the Unions") and the Creditors' Committee filed amici curiae briefs in the court of appeals.

The Unions were present during the lower court proceedings. Even though they had an interest in the litigation, they did not seek to intervene or participate in the proceedings before the bankruptcy or district courts.

The Creditors' Committee also had an interest in the litigation. It participated in the proceedings before the bankruptcy and district courts, but did not seek intervention. The court of appeals denied the Creditors' Committee motion to intervene.

Chatham Supermarkets, Inc. was a party in the bankruptcy court and district court. It did not participate in the court of appeals.

TABLE OF CONTENTS

TABLE OF CONTENTS — (Cont'd)

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—(Cont'd)

OPINIONS BELOW

The court of appeals opinion is reported at 706 F.2d 187 (1a).[1] The district court's opinion is reported at 6 Bank. Rep. 968 (9a). The bankruptcy court's oral opinion is unreported (35a).

JURISDICTION

The court of appeals judgment was entered on May 11, 1983 (51a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 313(1) of the Bankruptcy Act provided:

"Upon the filing of a petition, the court may, in addition to the jurisdiction, powers and duties conferred and imposed upon it by this Chapter—

(1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate." 11 U.S.C. §713(1).[2]

Section 8(d) of the National Labor Relations Act provides in pertinent part:

"(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if

[1] References are to the appendix attached to this petition.

[2] This case was instituted before the effective date of the new Bankruptcy Code adopted in 1978 (11 U.S.C. §1001 *et seq.*), and refer to the enumeration of the prior act.

requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3) and (4). . . shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such

terms and conditions can be reopened upon the provisions of the contract . . . ." 29 U.S.C. §158(d).

28 U.S.C. §455 provides in pertinent part:

"(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

* * *

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

STATEMENT OF THE CASE

The lower courts held that under bankruptcy proceedings, an individual employer party to a multi-employer collective bargaining agreement could withdraw from the contract while it was in effect, without regard to the other employer parties. This result conflicts with, and could have a compelling impact upon, the long standing and nationally favored practice of multi-employer bargaining and the NLRB's paramount objective of preserving the stability of multi-employer units. Employers, who enter into these agreements in order to obtain wage parity, will think twice about group negotiations because of the fear that after the agreement is in effect, they alone may be bound to it terms while their competitors are given favored treatment.

This result also conflicts with the majority of the federal courts which hold that a debtor's rejection of labor contracts must meet a stricter standard than rejection of other types of contracts. This stricter standard requires at a minimum that the bankruptcy court balance the equities of all the parties to labor contracts before authorizing rejection.

Allied Supermarkets, Inc. ("Allied") and Borman's, Inc. ("Borman's") each operate a supermarket chain in the metropolitan Detroit area. The employees of Allied and Borman's have been unionized for many years. For more than 20 years, Allied, Borman's and Chatham Supermarkets, Inc. ("Chatham"), another supermarket chain operator, had participated together in a multi-employer collective bargaining unit known as United Supermarket Association ("USA") for the purpose of bargaining with two major unions: the Retail Store Employees Union ("Retail Clerks") and the Amalgamated Meat Cutters and Butcher Workmen of North America ("Meat Cutters"). Throughout this entire 20 year period, USA had used a single labor relations consultant, Jack Bushkin, to represent it in the negotiation of the collective bargaining agreements (13a-14a).

The negotiation and formation of the contracts had followed a consistent pattern during this 20 year period. When the terms of the contract were agreed upon, a handwritten memorandum of agreement was drafted and signed by the Unions' representatives and Bushkin (on behalf of USA). Beneath Bushkin's signature were those of representatives of the three USA members. Once this memorandum of agreement was signed, a new collective bargaining agreement came into existence, subject only to member ratification (13a-14a).

Ratification was accomplished by combining the votes of all the members of the locals who were employed by Allied, Borman's and Chatham. There was no procedure for rejection by the employees of one USA member or less than a

majority of the aggregate of employees (14a). Combined voting was necessary because, according to the president of the Retail Clerks local, "all of the employees of Allied, Borman's and Chatham that are covered by that contract are deemed part of one bargaining unit" (63a).

After the combined vote of the employees had resulted in ratification, a form document was prepared and executed by Bushkin on behalf of USA "as the Employer" and the Union and distributed to the union members. Identical copies were sent to each of the USA members for their individual signatures (14a).

On November 6, 1978, while the multi-employer collective bargaining agreements were in effect, Allied filed petitions for itself and its wholly-owned subsidiary, Great Scott Supermarkets, Inc., for an arrangement under Chapter XI of the Bankruptcy Act (9a), 11 U.S.C. §701 *et seq.* At 4:30 p.m. on March 23, 1979, while the multi-employer collective bargaining agreements were in effect, Allied filed form applications to reject the agreements with Local 539 of the Meat Cutters and Locals 876 and 36 of the Retail Clerks under section 313(1) of the Bankruptcy Act (52a-57a), 11 U.S.C. §713(1). Allied noticed the three applications for hearing on the morning of the next business day after the filing (52a-57a). Allied did not notify Borman's or Chatham, the other employer parties to the multi-employer agreements which Allied sought to reject, of its pending applications (11a).

Borman's learned of the applications through a telephone call from counsel for one of the unions. Borman's appeared at the hearing and objected to Allied's attempt to ramrod its repudiation of substantial contractual obligations through the court, without notice to all the parties subject to the contracts. The bankruptcy judge acknowledged that Borman's and Chatham had an interest entitled to protection and granted their motions to intervene (11a).

The hearing on Allied's petition for rejection began on March 30, 1979. The parties agreed that a stricter standard

than "benefit to the debtor" (the ordinary standard) must be met when application is made to reject a labor contract (22a). The primary dispute before the bankruptcy court was who were the parties to the collective bargaining agreements. It was Allied's position from the outset that the contracts involved only Allied and the unions. Accordingly, Allied submitted the "individual copy" of the multi-employer agreement for rejection (58a). Borman's and Chatham maintained that the contracts were between USA and the unions and that the special nature of multi-employer contracts required the court to consider the interests of all parties to these collective bargaining agreements (69a-70a).

In keeping with its position that the collective bargaining agreements were multi-employer contracts, the intervenors sought to introduce the testimony of Dr. Mark Kahn, a qualified expert in economics and labor relations. Dr. Kahn testified as to the purposes and advantages of multi-employer bargaining. The intervenors also offered Dr. Kahn's expert testimony to show the potential impact on labor relations in the supermarket industry if Allied were permitted to withdraw from these contracts. The bankruptcy judge held that evidence to be inadmissible, but finally allowed a separate record to be made (70a).

The basis for Allied's request for authority to reject the labor contracts was that it had formulated a Business Plan, which had been approved just two weeks before by the Creditors' Committee, and rejection of these contracts was part of that Plan (10a).

Allied's Chairman testified that the Business Plan was a seamless web, an "all or nothing" proposal in which every one of the elements was essential to success. He said that all of Allied's employees would have to accept wage concessions in order for the Plan to succeed. Thus, in order for the Plan to work, *all* of Allied's collective bargaining agreements would have to be modified (61a-62a).

On March 23, 1979, the same day the applications to reject the contracts were filed and two days before the next

scheduled wage increase, Allied's Chairman appealed to the Allied employees belonging to the Retail Clerks, Local 876, and Meat Cutters, Local 539, to make major wage and benefit concessions for the next two years.

Despite some assurances from the leadership of the Retail Clerks and the Meat Cutters about the requested contract modifications, Allied in fact had no agreements with these unions or the Teamsters about the new contract terms, should the existing contracts be rejected (61a-62a).

Allied's Chairman did not at that time address the company's Teamster employees. Nor did Allied seek to reject its labor agreement with the Teamsters, which was not a multi-employer agreement. In fact, the Teamsters opposed Allied's proposed wage freeze and reductions in benefits and stated its opposition on the record in this case (10a, n.2, 72a).[3] A representative of the Teamsters, who asked to be heard at the outset of the proceedings, emphasized that it would continue to demand enforcement of its contracts with Allied and that it would be "extremely unwise" for the court to reject the labor agreements. The bankruptcy judge said he was not interested in the Teamsters statement (59a-60a). Allied adduced no evidence to explain how the Business Plan, which could only succeed if every part fell into place, could be achieved if the Teamsters flatly refused to accept a reduction in its contract.

Following the close of arguments, the bankruptcy judge immediately rendered an opinion from the bench (35a). He agreed with Allied and found that there was no issue before him as to the existence or rejection of multi-employer contracts and refused to consider any of Dr. Kahn's testimony (43a-44a, 45a-49a). The bankruptcy judge also refused to consider the Teamsters' refusal to make any con-

[3] Page 72a is a copy of proposed exhibit 19, a letter from Teamsters Local 337 to Allied dated March 28, 1979, formally advising Allied that Local 337 had not accepted and had no intention of accepting a wage freeze or modification of the existing contract terms. The bankruptcy judge refused to admit exhibit 19 into evidence, on the ground that evidence regarding the Teamsters agreement was irrelevant (64a).

cessions. The bankruptcy judge then entered an order granting Allied's request to reject its "individual" collective bargaining agreements as "burdensome to the estate" (50a).

On April 4, 1979, Borman's filed its Notice of Appeal to the district court under 11 U.S.C. §67 (9a). Following oral argument and briefing, on September 5, 1980, the district judge rendered a written opinion and order in which he expressly reversed the bankruptcy judge's finding that there were no multi-employer contracts. He declared:

> "The testimony addressed in the proceedings before the bankruptcy judge satisfies the Court that Allied, Borman's and Chatham intended to be bound by group negotiations through the U.S.A. *The Court therefore concludes that a multi-employer bargaining unit did exist here*" (16a-17a; footnote omitted; emphasis added).

Despite the district court's finding that the contracts at issue were the multi-employer contracts urged by the intervenors and not the individual contracts which were rejected under the bankruptcy judge's order, it nevertheless concluded that the stricter standard used for rejection of labor contracts did not apply to these contracts and held that the bankruptcy judge was correct in holding that the only interests of relevance were those of Allied and its employees:

> "The Bankruptcy Court did not accord the interests of Allied's competitors too little weight, for it is the opinion of this Court that under the facts of this unique case, Borman's and Chatham's interest were entitled to little or no weight in relation to the crucial and immediate interests of Allied and Allied's employees" (31a).

In its brief to the district court, Allied offered after-the-fact support for the bankruptcy court's decision by assuring that "in fact, following the trial, the Teamster's Union agreed to the concessions." What Allied failed to reveal, however, was that in order to obtain such concessions, *Allied improperly enlisted the aid of the bankruptcy judge,*

who engaged in extrajudicial activities in personally appealing to Teamster members to support Allied's Business Plan.

Shortly after the rejection hearing before the bankruptcy judge (at which he had warned the Teamsters' representative that he only considered matters brought before him in court), the judge appeared before Allied's Teamster employees in aid of Allied's efforts to exact concessions from that union. The judge, in the company of Allied's officers and counsel, appeared at two different meetings—one at a Teamsters hall and one at Allied's warehouse—without notice to others interested in these proceedings and without any of the formalities associated with judicial proceedings (73a-78a).[4] Borman's complained to the district court about this conduct which demonstrated that the bankruptcy court was biased. The district court did not address or even mention the bankruptcy judge's extrajudicial conduct.

On October 1, 1980, Borman's filed its Notice to Appeal the district court's decision. On March 15, 1982, the Sixth Circuit Court of Appeals heard oral argument. On May 11, 1983, the court of appeals issued its opinion affirming the district court (1a). It held that the stricter standard did not apply to this case and "the general rule which looks only to whether rejection would be advantageous to the debtor is properly applied" (8a). The court of appeals did not address the question, raised by Borman's, of whether Allied had satisfied the stricter standard. Nor did the court of appeals address or mention the bankruptcy judge's improper conduct and demonstrated bias which Borman's asserted as a ground for reversal.

REASONS FOR GRANTING THE PETITION

Federal courts throughout the nation have recognized that rejection of collective bargaining agreements (while possibly furthering the policy of the Bankruptcy Act) con-

[4] Borman's did not learn about the bankruptcy judge's conduct until some months later when it was revealed during depositions of two Teamster officials in connection with related litigation.

flicts with the National Labor Relations Act, which prohibits unilateral modification of collective bargaining agreements, and its policy of promoting industrial peace. In an effort to satisfy the policies of both acts, the courts have, in varying degrees, applied a stricter standard to applications for rejection of labor contracts than the standard typically used for rejection of other types of contracts. In contravention of the consensus throughout the country, the lower courts in this case refused to apply a stricter standard to these collective bargaining agreements.

This court has recently granted *certiorari* to consider the conflict between the two acts and the burden which a debtor must meet in order to reject a collective bargaining agreement. *NLRB* v. *Bildisco and Bildisco*, 682 F.2d 72 (3rd Cir. 1982), *cert. granted*, ___ U.S. ___, 103 S.Ct. 784, 74 L.Ed.2d 992 (1983). This case involves the same question raised in *Bildisco* in a slightly different factual context: here the contracts which were rejected were multi-employer collective bargaining agreements. Thus, the rejections in this case conflicted not only with the prohibition against unilateral modification of collective bargaining agreements, but also permitted Allied to withdraw from the multi-employer unit *after the collective bargaining agreement had been in effect and while all the parties were operating thereunder*. Neither the NLRB nor any court has ever held that an employer may withdraw from a multi-employer association in this situation. Granting *certiorari* in this case would give this Court the opportunity to consider and address the full panoply of questions which may arise when a debtor seeks to reject collective bargaining agreements.

This case also involves the integrity of the judicial process. The bankruptcy judge's extrajudicial effort, to persuade interested parties to take a particular course of conduct in order to help a litigant, is an affront to the judiciary.

1. This Court Has Granted Certiorari in a Similar Case and Should Consider This Case in Order to More Fully Address the Issues Facing It

Rejection of collective bargaining agreements involves a clash between the policies of the National Labor Relations Act and the Bankruptcy Act.

Section 313(1) of the Bankruptcy Act provided that the court could permit a debtor to reject (terminate) executory contracts. 11 U.S.C. §713(1). Courts had granted rejection of ordinary executory contracts upon the mere showing that rejection would benefit the estate. *See generally*, Note: "The Labor—Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreement," 80 *Mich. L. Rev.* 134 (1981). However, under the NLRA, the parties to a collective bargaining agreement may not "terminate or modify" the agreement unless designated statutory procedures are followed. 29 U.S.C. §158(d).

Section 313 of the Bankruptcy Act did not expressly exclude or include collective bargaining agreements. Section 8(d) of the NLRA does not include bankruptcy procedures as a method of modifying or terminating a collective bargaining agreement. Despite section 8(d) of the NLRA, the federal courts have held that collective bargaining agreements are included within the executory contract language of section 313. *See, Shopmen's Local No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698, 701 (2nd Cir. 1975). But the courts have recognized the conflict between the two statutory schemes, and have thus concluded that while collective bargaining agreements are subject to section 313, they should not be treated as ordinary contracts of the debtor. The second circuit became the forerunner in advancing a more stringent test to be used when collective bargaining agreements are at issue. In *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, *supra*, the court expressly rejected the "benefit to the estate" or "business judgement" test used for other executory contracts:

> "The decision to allow rejection [of collective bargaining agreements] should not be based solely on whether it

will improve the financial status of the debtor. Such a narrow approach totally ignores the policies of the Labor Act and makes no attempt to accommodate to them." 519 F.2d at 707.

Under the test developed by the second circuit, a labor agreement can be rejected "only after thorough scrutiny and a careful balancing of the equities on both sides. . ." and only if the contract is "onerous and burdensome" and rejection "appears to be the lesser of two evils." *Shopmen's Local No. 455* v. *Kevin Steel Products, Inc.*, *supra*, at 707; *Brotherhood of Railway, Airline & Steamship Clerks* v. *R.E.A. Express, Inc.*, 523 F.2d 164, 169, 172 (2nd Cir.), *cert. denied*, 423 U.S. 1017, 96 S.Ct. 451, 46 L.Ed.2d 388 (1975).

Some courts have rejected the second prong of the *Kevin Steel/R.E.A.* test, but the majority agree that at least "thorough scrutiny and a careful balancing of the equities" are required before a collective bargaining agreement may be rejected. In adopting a more stringent test for rejection of collective bargaining agreements, the courts determined that it was necessary to give some effect to the NLRA and its policy to preserve industrial peace. *NLRB* v. *Bildisco and Bildisco*, *supra*, at 77-78; *Shopmen's Local No. 455* v. *Kevin Steel Products, Inc.*, *supra*, at 706; *In re Figure Flattery, Inc.*, 88 C.C.H. Lab. Cases ¶ 11850 (S.D.N.Y. 1980). This Court has granted *certiorari* to consider whether the second prong of *Kevin Steel/R.E.A.* applies to applications for rejection of collective bargaining agreements. *NLRB* v. *Bildisco and Bildisco*, *supra*. This case adds a dimension to *Bildisco* (preservation of multi-employer bargaining), and if *certiorari* is granted, it would thus insure the formulation of a more complete test for rejection of collective bargaining agreements.[5] A more complete test would

[5] Under a more stringent test, negotiated wage terms should not be rejected unless they are "unusually high, onerous and burdensome." *In re Studio Eight Lighting, Inc.*, 91 B.N.A., L.R.R.M. 2429 (E.D.N.Y. 1976). While concluding that Allied's labor contracts were "onerous and burdensome," the bankruptcy court made no findings of fact as to whether Allied's wage obligations—identical on their face as to the terms under

(continued on next page)

assist the lower courts, which have faced the problem of accommodating the two acts for a number of years, in deciding these important questions. In view of the present economic situation, there will in all likelihood be many such cases and problems in the future.

2. The Lower Courts' Conclusion That the Stricter Standard Does Not Apply to These Multi-Employer Contracts Conflicts with Established Federal Law

This Court has declared that multi-employer bargaining fosters the very policy that *Kevin Steel* and its progeny found necessary to preserve — multi-employer bargaining is

---

(footnote 5 continued from previous page)

which Borman's, Chatham, A & P and Kroger operate—were "unusually burdensome." Nor was there any basis in the record for such findings. The district court did not conclude that Allied was paying wages that were out of line with those its competitors were paying. However, rather than meet the issue head on, the district court chose to declare that the doctrine of comparison did not apply (26a-27a). The court of appeals did not address this question.

Other courts disagree with the district court's analysis in this case. In *Matter of Ryan Co., Inc.*, 83 C.C.H. Lab. Cases ¶ 10,487 (D.C. Conn. 1978), the court determined that wage and benefit terms of a collective bargaining agreement were onerous and burdensome only after an exhaustive and thorough analysis and comparison to what the debtor's competitors were paying. The court concluded that due to the "salary differential" between the debtor and its competitors, the contract was onerous and burdensome. Unlike the district court in this case, the *Ryan* court did not analyze the question of wages in a vacuum.

The question of whether the wages are onerous is especially important in the multi-employer situation. As discussed *infra*, a primary motivation of employer participation in multi-employer bargaining is the assurance that a competitor will not have the advantage of paying lower wages. Before this foundation of multi-employer agreements is destroyed by the bankruptcy court, the court should make sure that the terms are indeed onerous.

Similarly, the lower courts erred in refusing to consider the feasibility of the Business Plan. Before overturning a long-standing pattern of multi-employer agreements which included uniform wages, the lower courts should have considered if the many other less disruptive provisions of the Plan were feasible.

In order to achieve a proper balance between the two acts, these issues should be addressed and considered in the formulation of an appropriate test. *See, In the Matter of Brada Miller Freight System, Inc.*, 702 F.2d 890, 899-900 (11th Cir. 1983).

"a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *NLRB* v. *Truck Drivers Local Union, No. 449 (Buffalo Linen)*, 353 U.S. 87, 95, 77 S.Ct. 643, 1 L.Ed.2d 676 (1957).[6] As summed up by the third circuit:

> "Since the decision in *Buffalo Linen, the federal courts have continued to recognize that multi-employer bargaining units are an important component of national labor policy*. For this reason, the stability of those units is a paramount objective of the Board and an essential ingredient of its efforts to achieve peaceful labor relations." *NLRB* v. *Beck Engraving Co.*, 522 F.2d 475, 480 (3rd Cir. 1975).

Indeed, this Court has recently reaffirmed the *Buffalo Linen* pronouncement that multi-employer bargaining is vital to the national labor policy. *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S. 404, 102 S.Ct. 720, 70 L.Ed.2d 656 (1982). Contrary to the lower courts' conclusion, the national labor policy of preserving labor peace is

---

[6] The district judge attempted to differentiate this case from *Kevin Steel* when he declared:

> "[W]here, as here, the union is fully advised of the debtor's intent to reject the contract, is represented at the proceedings held in connection with the application to reject, but does not object, the possible disruption of labor peace is minimized. The Bankruptcy Court ruled and Allied has urged that because no employer-employee relationship is at issue here, the Court need not employ the stricter standards enunciated in *Kevin Steel* and *R.E.A. Express*. In this Court's opinion there is merit to this argument" (24a-25a).

The court of appeals said:

> "Thus, we hold that an employer's interest in holding another employer to the terms of a labor contract negotiated by a multi-employer bargaining unit need not be weighed when passing upon applications to disaffirm executory labor contracts. When such objections arise, the general rule which looks only to whether rejection would be advantageous to the debtor is properly applied" (7a-8a; footnote omitted).

The court of appeals erroneously assumed that Allied had requested that its contracts with Borman's and Chatham be rejected.

not concerned only with maintaining the individual employer-employee relationship. In *Bonanno*, this Court recognized the "private and public interest" served by multi-employer bargaining:

> "Multiemployer bargaining offers advantages to both management and labor. It enables smaller employers to bargain 'on an equal basis with a large union' and avoid 'the competitive disadvantages resulting from nonuniform contractual terms.' At the same time, it facilitates the development of industry-wide, worker benefit programs that employers otherwise might be unable to provide. More generally, multiemployer bargaining encourages both sides to adopt a flexible attitude during negotiations; as the Board explains, employers can make concessions 'without fear that other employers will refuse to make similar concessions to achieve a competitive advantage,' and a union can act similarly 'without fear that the employees will be dissatisfied at not receiving the same benefits which the union might win from other employers.' Finally, *by permitting the union and employers to concentrate their bargaining resources on the negotiation of a single contract, multiemployer bargaining enhances the efficiency and effectiveness of the collective bargaining process and thereby reduces industrial strife.*" *NLRB* v. *Charles D. Bonanno Linen Service, Inc.*, *supra*, 454 U.S. at 409, n.3, quoting the court of appeals' opinion (630 F.2d at 28) with approval (emphasis added; citations omitted).

"[T]hose interests would be undermined" and "would jeopardize the viability and effectiveness of the bargaining process" were a party free to renounce unilaterally its obligation or to withdraw from the multi-employer unit. 630 F.2d at 28.

The need for maintaining a multi-employer unit is of overriding importance. Thus, in order to accomplish the paramount goal of "preserving labor peace," each employer is bound by the contract negotiated by the multi-employer

association. *Andino* v. *NLRB*, 619 F.2d 147 (1st Cir. 1980); *Authorized Air Conditioning Co. Inc.* v. *NLRB*, 606 F.2d 899 (9th Cir. 1979), *cert. den.*, 445 U.S. 950, 100 S.Ct. 1598, 63 L.Ed.2d 785 (1980); *Universal Insulation* v. *NLRB*, 361 F.2d 406 (6th Cir. 1966). After joining, the individual employer members are free to withdraw from the association provided they give timely unconditional and unequivocal notice of withdrawal, preferably in writing, to the union and other employer members. *Andino* v. *NLRB*, *supra*; *NLRB* v. *Central Plumbing Co.*, 492 F.2d 1252 (6th Cir. 1974).

"*Once the parties begin negotiations, however, a party may withdraw only if unusual circumstances exist or if both the union and the employers' association agree to the withdrawal.* . . . [A]fter negotiations have begun, the parties are required to honor their commitment to the process of multiemployer bargaining, which they freely elected." *NLRB* v. *Marine Machine Works, Inc.*, 635 F.2d 522 (5A Cir. 1981) (emphasis added). *See also, NLRB* v. *Beck Engraving Co., Inc., supra*, at 481 ("[P]rior to negotiations, either the union or an employer in a multi-employer bargaining unit may unilaterally. . . withdraw if adequate written notice is given which evidences an unambiguous intent to withdraw; *during negotiations, withdrawal is permissible upon mutual consent or may occur unilaterally in the event of unusual circumstances.*") (emphasis added). *See also, NLRB* v. *Johnson Sheet Metal, Inc.*, 442 F.2d 1056, 1059 (10th Cir. 1971).

The lower courts defied these well established principles when they in effect granted Allied permission to withdraw unilaterally from the multi-employer association and renounce its obligations under the already negotiated and then operating collective bargaining agreements without timely notice or approval. To conclude, as did the district judge, that this unilateral withdrawal did not upset the stability of USA and threaten the labor peace that is protected by the association is to conclude, without explanation, that this multi-employer association is somehow different from all others (26a). There is no basis for that conclusion.

The court of appeals affirmed the district court's conclusion and erroneously commented:

> "Allied always had a right to withdraw from the multiemployer bargaining unit. . . . After the multiemployer bargaining unit has commenced negotiations with a union, an individual employer may still withdraw where the union consents,[7] or where the employer faces 'unusual circumstances such as evident economic hardship' " (8a, n.9).

However, contrary to the court's casual remark, there has never been a case where, as here, withdrawal was permitted *during the term of the contract.*

Not only are the lower courts' opinions divergent from the case law, but the record evidence, which they ignored, showed that multi-employer contracts in general, and these in particular, are indeed subject to the protection of the *Kevin Steel* doctrine.

Dr. Kahn testified without contradiction that multi-employer bargaining is typical in industries such as the supermarket industry, which is characterized by a large number of competitors, intense competition, lack of significant product differentiation and high labor costs (64a-65a). It is especially important in industries involving perishable goods where strikes are devastating because of the inevitable loss of business and inventory (65a-66a).[8]

---

[7] This statement conflicts with *NLRB* v. *Marine Machine Works, Inc.*, *supra*, which declares that the association must consent to withdrawal after negotiations have begun. Indeed, if the association's consent were not required, it would encourage whipsawing (the primary evil which multi-employer bargaining was designed to prevent) if an impasse occurred during negotiations.

[8] This Court has noted:

> "A recent survey of major collective-bargaining agreements (those covering 1,000 or more employees) found that of 1,536 major agreements, 648 (42%) were multi-employer agreements and that 3,238,400 employees were covered by these agreements. U.S. Bureau of Labor Statistics, Dept. of Labor, Bull. No. 2065, Characteristics of Major Collective Bargaining Agreements—January 1, 1978, p. 12, table 1.8 (1980)." *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, *supra*, 454 U.S. at 410, n. 4.

According to Dr. Kahn, multi-employer bargaining fosters employee stability because wages and benefits are uniform and there is better policing by the unions (66a-69a).

Allied's chairman testified that one of the purposes of having a multi-employer bargaining unit is ". . . to protect the participants against the eventuality that one company will obtain a better labor contract than its competitors. . ." (62a). This was consistent with his earlier testimony that it was beneficial for Allied to have common labor costs with those of its major competitors. Allied's chairman's view of the benefits of multi-employer bargaining conformed with that of Horace Brown, President of the Retail Clerks. Brown testified that such bargaining groups prevented one employer from getting a competitive advantage in labor cost over another (63a-64a).

In Dr. Kahn's opinion, the purpose served by the USA's multi-employer bargaining was "to generate a certain type of stability that can be achieved only through uniform terms" (68a). He testified that the stability so achieved could be "seriously jeopardized" by Allied's proposed wage freeze, which he referred to as "a subdivision of Allied through lower wages and fringes that would break up the historic uniform package" (68a).

> "Having made that point, I could foresee a situation in the face of very high labor costs prevailing in the industry that a significant reduction in these costs on the part of one of those chains could have significant repercussions on the ability of the competitors to compete if they permit it.
>
> In other words, if Allied stores in any way [do] achieve lower prices, the fickle consumer can very readily transfer his or her business to the very supermarket that offers lower prices.
>
> And if those lower prices are achieved through lower labor costs than the industry as a whole is paying, that can *seriously disrupt the whole pattern of collective bargaining in the industry*.

It might adversely affect labor standards achieved in the industry as a whole in the Detroit area" (68a-69a; emphasis added).

Dr. Kahn agreed that lower wage rates reduce costs, but emphasized that they present only a short-term solution:

"I don't think that an enterprise of this kind in a highly competitive kind of industry would be likely to survive very long at significantly substandard rates of pay because it wouldn't be able to, for example, hold on to good employees.

Nor do I think realistically that a union that represents all the employees against the industry could tolerate or would tolerate realistically, in effect, the subsidization of this particular employer's problem, how they originated through substandard wages" (70a-71a).

While Chapter XI of the Bankruptcy Act was designed to permit the rehabilitation of debtors, Congress certainly never intended that the debtor's rehabilitation be so imperative as to take precedence over the welfare and stability of the industry to which the debtor belongs. *In re Mamie Conti Gowns, Inc.*, 12 F. Supp. 478 (S.D.N.Y. 1935).[9]

In *Mamie Conti Gowns*, a similar objection to rejection of a multi-employer agreement was raised, based upon the value of fragile and hard-won stability in the dress industry following a period marred by severe agitation and strikes. As in this case, the debtor claimed that its labor expenses were disporportionately large "and that no feasible plan of reorganization providing for a fair prospect of profit in the future can be put forth as long as the contract remains in force." 12 F. Supp. at 480. The unions responded that the agreement was fair and had produced industrial stability, while rejection would provide the debtor "an unwarranted advantage over its competitors," leading eventually to "chaos in the industry." *Id.*

[9] While this case was decided before passage of the Chandler Act in 1938, its reasoning is no less applicable to the Bankruptcy Act.

The court prohibited rejection, after weighing the benefits of rejection against the potential for major economic disruption:

> "Viewing the results of an opposite conclusion broadly both as to employees in the dress industry and employers, competitors of the debtor and particularly its associated members of the Allied Manufacturers Association, and on all the facts before me relating to this individual manufacturer and its employees, I will deny the petition." *Id.* (emphasis added).

It was conceded that multi-employer bargaining is attractive to employers because it insures that their competitors will not have a more favorable labor contract. If the lower courts' opinions are upheld, and an individual employer is granted permission to withdraw from a multi-employer association upon the mere showing that the withdrawal would benefit the employer, the uniform labor terms (the attraction to multi-employer bargaining) would dissolve and there would be little incentive for any group of employers to continue to bargain collectively.

It is evident from the record in this case and the policy of multi-employer bargaining recognized and confirmed by case law, that any division of a multi-employer unit upsets the stability necessary for "labor peace" which is protected by the *Kevin Steel* doctrine. Moreover, the lower courts' refusal to apply a stricter standard in this case is a direct affront to the deeply rooted national labor policy favoring the preservation of multi-employer bargaining. The lower courts' conclusion that the *Kevin Steel* doctrine does not apply to these contracts is contrary to other federal court decisions and requires reversal.

3. The Lower Courts' Refusal to Consider All The Parties to the Contract Conflicts with Established Federal Law

The lower courts' conclusion that the interests of Allied and its employees were the only ones of relevance under these multi-employer contracts is an error of law.

Assuming the district court was correct that "the industrial peace which the *Kevin Steel* court thought was threatened by rejection of the collective bargaining agreements involved the relationship of an employer to its employees," it then becomes imperative to properly identify the "employer" and "employees" (25a).

The law is clear that once a multi-employer association is formed, it becomes the employer. *Universal Insulation Corporation* v. *NLRB*, 361 F.2d 406 (6th Cir. 1966). *See also*, Morris, *The Developing Labor Law*, p. 236 (1970). As the district court recognized, Bushkin signed the contracts on behalf of USA as "employer." Allied did not withdraw from USA before it sought rejection. Consequently, at the time the applications for rejection were submitted, it was USA, not Allied, who was the employer.

The district judge's finding that Allied, Borman's and Chatham were merely formal parties to the collective bargaining agreements is inconsistent with established precedent. Contrary to his conclusion, the three members were unseverable units which, when considered together, constituted the employer under the agreements. Allied having no independent employer status, its interest could not be considered separate and apart from those of Borman's and Chatham. The district court's attempt to so segregate and the court of appeals' affirmance conflict with defined principles of labor law.

Likewise, all of the employees under the USA contracts were part of an unseverable unit. The record established, and the district judge found, that the employees of Allied, Borman's and Chatham voted collectively to ratify the subject contracts (14a).

It is well established that if an employer belongs to a multi-employer association, its employees cannot segregate themselves and bargain individually with their employer. *NLRB* v. *Custom Wood Specialties, Inc.*, 622 F.2d 381 (8th Cir. 1980).

> "[O]nce the multi-employer bargaining unit is established the relevant majority is the entire unit. Even if a majority of the employees of a single employer in the unit no longer wish to be represented by the union, that fact would not relieve the . . . [employer] of its obligation to bargain with the Union as to the appropriate multi-employer unit nor justify an untimely withdrawal from such unit." Morris, *The Developing Labor Law* (1970), p. 240 quoting *Sheridan Creations, Inc.*, 148 N.L.R.B. 1503, 57 L.R.R.M. 1176 (1964), *enforced*, 357 F.2d 245 (2nd Cir. 1966), *cert. denied*, 385 U.S. 1005, 87 S.Ct. 711, 17 L.Ed.2d 544 (1967).

Allied attempted to side-step this doctrine by advising only its employees of the proposed wage concessions and Business Plan. Allied's action was based on its erroneous contention that its contracts were individual. The lower courts ignored this doctrine when they held that the interests of Allied and its employees were somehow superior and severable because they were "crucial and immediate" (31a). Indeed, the district judge misperceived the identity of the employees under the contracts when he declared: "[T]he Business Plan's purposes were approved by a vote of the locals involved" (21a). As already established, the employees of all three chains together constituted the employee locals involved. Thus, there has never been a vote of the "locals involved."

Although the district judge noted that ratification of the agreements "is union-wide without regard to the particular employer," the lower courts ignored that fact when they considered only Allied's employees in authorizing rejection of the contracts. While it is possible, as the district court commented, that a majority of Allied's employees did not ratify the agreement, it is also possible that Allied's employees in fact constituted the necessary majority to bind the employees of Borman's and Chatham. Consideration of Allied's employees separately means, in effect, that they had the power to bind Borman's and Chatham's employees to a contract which Allied and/or its employees could later

choose to individually rescind. Such an absurd result conflicts with the national policy behind multi-employee bargaining which requires all employers and employees to be bound by the group contract.

4. This Court Should Address the Bankruptcy Judge's Conduct in Coming to the Aid of a Litigant

Borman's urged the bankruptcy court to consider that implementation of the Business Plan was dependent, among many other items, on the willingness of the Teamsters Union to agree to wage concessions similar to those asked of the Retail Clerks and Meat Cutters. This hurdle loomed particularly large, in view of the statement made in open court by a Teamsters representative that it expected Allied to abide by the labor contracts it had with that union (59a-60a). With the Teamsters forming such a vital link in Allied's operations, and with their having voluntarily appeared to object to any tampering with their contract, Borman's urged the court to weigh the impact of the Teamsters' position against the claims of Allied. This the court would not do. Instead, the court admonished the Teamsters' representative in the following words:

> "THE COURT: Well, sir, I don't go out and grab people and bring them in here to present matters to me.
>
> They haven't brought a petition before me to reject your contract.
>
> When they do, I will decide it" (60a).

Despite the bankruptcy judge's open-court statement that he would not "go out and grab people" and would decide only matters brought before him, he appeared at Teamster meetings and assisted Allied in its efforts to win concessions from Allied's Teamster employees. These meetings arose out of the issues before the bankruptcy judge but were not themselves part of the court proceedings. The meetings were informal; during the meeting, the judge told those in attendance to "call him Harry" (77a-78a).

Under 28 U.S.C. §455, a judge has an obligation to disqualify himself in any proceeding in which "his impartiality might reasonably be questioned." A judge may not align himself with one of the litigants:

> "The judge should exercise self-restraint and preserve an atmosphere of impartiality. *Pariser* v. *City of New York*, 2 Cir., 146 F.2d 431, 433. When the remarks of the judge during the course of a trial, or his manner of handling the trial, clearly indicate a hostility to one of the parties, or an unwarranted prejudgment of the merits of the case, *or an alignment on the part of the Court with one of the parties for the purpose of furthering or supporting the contentions of such party*, the judge indicates, whether consciously or not, a personal bias and prejudice which renders invalid any resulting judgment in favor of the party so favored." *Knapp* v. *Kinsey*, 232 F.2d 458, 466 (6th Cir.), *cert. denied*, 352 U.S. 892, 77 S. Ct. 131, 1 L.Ed.2d 86 (1956) (emphasis added). *See also, Roberts* v. *Bailor*, 625 F.2d 126 (6th Cir. 1980).

The bankruptcy judge's conduct demonstrates without doubt that he had aligned himself with Allied and in fact, had become a spokesperson for Allied.

Not only did the bankruptcy judge improperly interject himself into the domain of the litigants, he allowed himself to become the ultimate arbitrator of any wage dispute between the Teamsters and Allied (73a-78a). Surely this was not the proper role of a federal judge. It indicates that, however well intentioned his efforts might have been to "save Allied," the judge had crossed the line from a judge to an advocate, to the substantial prejudice of Borman's.

The significance of the judge's conduct becomes even more apparent when it is remembered that *without the Teamsters' agreement, Allied could not implement the concessions obtained from the Retail Clerks and Meat Cutters*. As stated at page 10 of Allied's brief in the district court:

> "It was also understood that no concessions by any union would be enforced, even if the Court granted rejection of the collective bargaining agreements, unless Allied had the commitment of all employees, union and non-union, to participate in the concessions."

Thus, the bankruptcy judge took it upon himself to insure that the relief he thought he had granted in the courtroom would not be impeded by a union's insistence on adhering to its contract.

In considering Borman's appeal, the district court and court of appeals completely ignored the bankruptcy judge's exhibited bias. On this basis alone, and to assure the integrity of the federal court, the lower courts' decisions must be reversed.

CONCLUSION

Wholesale rejection of collective bargaining agreements under the Bankruptcy Act, as was done here, threatens the policy behind the NLRA. It is evident that the national policy of promoting labor peace, as expressed in the NLRA, pertains to all types of collective bargaining agreements, whether single or multi-employer.

This Court is presently considering questions relating to rejection of single-employer collective bargaining agreements and the interplay of the Bankruptcy Act and the NLRA. *Certiorari* should be granted in this case so that the question of rejection of collective bargaining agreements can be more fully addressed.

Respectfully submitted,
BARRIS, SOTT, DENN & DRIKER
By: Donald E. Barris
Eugene Driker *(Counsel of record)*
Elaine Fieldman
Attorneys for Petitioner
Business Address:
2100 First Federal Building
1001 Woodward Avenue
Detroit, Michigan 48226
(313) 965-9725

Dated: August 9, 1983

Court of Appeals Opinion

No. 80-1685

UNITED STATES
COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BORMAN'S, INC.,
Plaintiff-Appellant,

-vs-

ALLIED SUPERMARKETS, INC.,
Defendant-Appellee.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed May 11, 1983

Before: LIVELY and JONES, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

PER CURIAM. Borman's, Inc. (Borman) appeals from a district court order affirming a bankruptcy court order which permitted Allied Supermarkets, Inc. (Allied) to reject its collective bargaining agreements with three local unions. We affirm.

I

On November 6, 1978, Allied filed a petition for arrangement under Chapter XI of the Bankruptcy Act.[1] During the pendency of the proceedings in the bankruptcy

[1] This citation, and all others in this opinion, refer to the statutory enumeration prior to the Revised Bankruptcy Act of 1978, 11 U.S.C. § 101, *et seq.* The provisions of the Revised Act do not apply to this case, which was commenced prior to the effective date of the new Act. *See* 11 U.S.C. Prec. § 101.

court. Allied was authorized to continue the operation of its business. Allied submitted to the bankruptcy court a comprehensive "Business Plan" which proposed a restructuring of its business in order to improve its chances for survival and a successful arrangement under Chapter XI. A principal element of the plan was the rejection of executory labor contracts[2] and renegotiations with the affected employees[3] through the collective bargaining process. The Business Plan had been approved by the Creditors Committee, an elected oversight group representing approximately 10,000 unsecured creditors to whom Allied owed more than $75,000,000. Allied had also received tentative approval from the affected unions.

On March 26, 1979, the bankruptcy court convened a hearing on Allied's application to reject the labor contracts. On that day, a Borman representative appeared before the bankruptcy judge and requested permission to intervene on the ground that Borman participated with Allied in a multi-employer bargaining group and would be adversely affected if Allied were permitted to reject the labor contracts. The bankruptcy judge permitted Borman to intervene and rescheduled the hearing on Allied's application to March 30, 1979, to afford Borman time for discovery.

---

[2] Allied sought rejection of the labor contract pursuant to § 313 (1) of the Act, 11 U.S.C. § 713 (1), which provides:

> Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties conferred and imposed upon it by this Chapter —
>
> (1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate: . . .

[3] The three union locals involved are Retail Store Employees Union Local No. 36, Retail Store Employees Union Local No. 876, and Amalgamated Meat Cutters and Butcher-Workmen of North America Local No. 539 (hereinafter collectively referred to as "the unions"). The Unions have filed a brief as *amici curiae* in this Court urging affirmance of the district court.

The bankruptcy judge resumed the hearing on March 30 and heard further evidence on March 31. The evidence indicated that Allied had been incurring substantial losses for a number of years in its supermarket operations. Allied's Chief Executive Officer testified that Allied's financial condition was so precarious that only the immediate and full implementation of the proposed Business Plan would permit Allied to remain in business. The termination of Allied's existing collective bargaining agreements and renegotiation of those contracts with significant concessions by the employees was viewed as crucial.[4]

All the other interested parties, including the unions, either urged approval of the Business Plan or raised no objection to it, with the exception of two Allied's Competitors, Borman and Chatham Supermarkets, Inc.[5] These two competitors introduced evidence establishing that they participated in a multiemployer bargaining unit known as the United Supermarket Association and that the Association had negotiated a standardized labor contract with the unions which equalized the labor costs for each company. Borman and Chatham contended that Allied could not reject the labor contracts without their approval. In the alternative, they contended that the bankruptcy judge was required to weigh their interests against the interests of Allied under a strict legal standard.

At the conclusion of the hearings, the bankruptcy judge held that Allied could reject the labor contracts, and the court subsequently approved Allied's applications. The dis-

---

[4] The bankruptcy court credited this testimony, noting that 65 to 75 percent of Allied's cost of operation was attributable to the cost of labor. App. 265.

[5] Chatham Supermarkets, Inc. (Chatham) participated with Borman and Allied in the multiemployer bargaining group. Chatham joined Borman in opposing Allied's rejection of the labor contracts in the proceedings before the bankruptcy court and the district court, but Chatham did not appeal from the district court's order of affirmance.

trict court affirmed the judgment of the bankruptcy court, and Borman brought this appeal.

II

On appeal, Borman contends that the bankruptcy court erred in failing to weigh its interests against the interests of Allied and the unions when it considered Allied's application to reject the labor contracts. We disagree.

As a general rule, a bankruptcy court presented with an application to disaffirm the obligations of an executory contract need determine only whether it is indeed executory and whether disaffirmance would be advantageous to the debtor. *Feldman* v. *Trans-East Air, Inc.*, 497 F.2d 352, 356 (2nd Cir. 1974). The burden or hardship which rejection would impose on other parties to such a contract is not a factor to be weighed by the bankruptcy court in ruling upon the debtor's application. *In re Mammoth Mart*, 536 F.2d 950, 954 (1st Cir. 1976); *Feldman* v. *Trans-East Air, Inc.*, *supra*; 8 Collier, Bankruptcy ¶ 3.15[8] (14th ed. 1971).

An exception to this general rule has been recognized by the Second Circuit where the executory contracts which the debtor seeks to reject are collective bargaining agreements. *Brotherhood of Railway, Airline and Steamship Clerks* v. *REA Express, Inc.*, 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975); *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975). In these cases, the court rejected the unions' argument that the Bankruptcy Act did not permit the rejection of executory labor contracts. However, the court did hold that a decision to allow the debtor to reject an executory labor contract should not be based solely on whether it would improve the financial status of the debtor, but rather should also consider the impact upon employees opposing the application. The court thus sought to resolve the tension between the Bankruptcy Act's policy in favor of giving the

debtor a new start and the National Labor Relations Act's[6] policy of encouraging enforcement of collective bargaining agreements, by permitting the rejection of such an agreement only after a "careful balancing of the equities on both sides." *Kevin Steel Products, Inc., supra* at 707, *quoting, In re Overseas National Airways*, 238 F.Supp. 359, 361 (E.D. N.Y. 1965).

Stressing the Second Circuit's view that "the bankruptcy court must move cautiously in allowing rejection of a collective bargaining agreement," *Kevin Steel, supra* at 707, Borman contends that the bankruptcy court erred in failing to weigh its interests in determining whether to permit rejection of the labor contracts.[7] We disagree. Whatever the merits of the "rule" that the courts must judge

[6] 29 U.S.C. § 151, *et seq.*

[7] Borman states that the bankruptcy court concluded that no multiemployer bargaining unit existed, and therefore did not recognize that Borman had an interest in Allied's application. Since the district court did find the existence of a multiemployer bargaining unit, Borman argues that the district court should have remanded the case to permit the bankruptcy court to weigh the equities in the first instance. However, we do not read the bankruptcy court's bench opinion as turning upon a finding that no multiemployer unit existed. The bankruptcy judge stated as follows:

> The relationship, the contract, call it whatever you may, existing between Borman, Allied, and Chatham is under no stretch of the imagination a labor contract. There is no employer-employee relationship between the two.
>
> It is not the type of collective bargaining agreement that 313 intended to exempt or give special treatment under Section 313.
>
> The type of contract that is entitled to special consideration under Section 313 is the contract or the agreement between the local unions in question here, the collective bargaining and in considering whether or not to reject, to permit rejection or to refuse rejection, the Court must look: Are the contracts executory? Will it be of an advantage to the Debtor, or, put another way, is the contract onerous or burdensome to the Debtor?
>
> Or to put it another way, does the existence or the continuance of the contract thwart rehabilitation of the Debtor?

Footnote 7 continued on p. 6a

applications to reject labor contracts by a more stringent standard than applications to reject other executory contracts,[8] that rule is inapplicable here. *Kevin Steel* and *REA Express* expressed concerns for the debtor's *employees* and sought to reconcile § 313 of the Bankruptcy Act with the national labor policy favoring enforcement of collective bargaining agreements. Borman cites no case holding that the interest of a debtor's *competitor* in holding the debtor to the terms of the labor contract negotiated by the multiemployer bargaining unit is also to be weighed. As a

---

Footnote 7 continued from p. 5a

> As the next issue, the Court must look and must protect and balance the equities and consider the welfare of the members of the collective bargaining unit.
>
> Putting it another way, to be more specific, what good is this going to do the Debtor in relationship to the harm that it is going to do these people who are members of this collective bargaining agency?

The bankruptcy court clearly was applying the test enunciated in *Kevin Steel*. Its rejection of Borman's claim turned not on a finding that no multiemployer bargaining unit existed, but rather on its belief that employers participating with the debtor in a multiemployer bargaining unit were not entitled to the "special consideration" which *Kevin Steel* extends to the unions with whom the debtor has signed collective bargaining agreements.

[8] The Second Circuit was not the first court to hold that executory labor contracts could be rejected pursuant to § 313 of the Bankruptcy Act; several courts had previously so held. *See e.g., Carpenters Local 2746 v. Turney Wood Products, Inc.*, 289 F.Supp. 143, 147-50 (W.D. Ark. 1968); *In re Overseas National Airways, Inc.*, 238 F.Supp. 359, 361 (E.D. N.Y. 1965); *In re Klaber Bros., Inc.*, 173 F.Supp. 83 (S.D. N.Y. 1959). Only the *Kevin Steel* and *REA Express* decisions, however, suggest that applications to reject executory labor contracts must be more strictly scrutinized than applications to reject other executory contracts. The Ninth Circuit has now also held that § 313 of the Act applies to executory labor contracts. *Local Joint Executive Bd. v. Hotel Circle*, 613 F.2d 210, 214 (9th Cir. 1980). However, the Ninth Circuit, while citing *Kevin Steel*, did not reach the question "whether the bankruptcy court should apply a stricter standard for authorizing the rejection of collective bargaining agreements as a means of reconciling the policies of the labor and bankruptcy laws." *Id.* at 213 n.2. Since here the unions have not opposed Allied's application, we similarly need not pass upon this question.

practical matter, the interest of the employees, represented by the unions, and the interest of Borman in the application simply are not comparable. As the district court stated:

> The Court has reservations regarding application of the *Kevin Steel* and *REA Express* tests to the facts of this case. Furthermore, even if the rights and interests of Allied's competitors were to be considered here, the Court would have serious concern about granting these interests any significant weight in comparison with Allied's interest and the interest of Allied's employees. Accepting the evidence which was presented to the bankruptcy judge, the direct and primary result of Allied's inability to reject these contracts is that Allied fails and its employees are jobless. On the other hand, if Allied is allowed to disaffirm these contracts and it receives certain concessions from its employees in subsequent contract negotiations, Allied's competitors may indirectly be adversely affected. In such a situation, the Court finds it difficult to conceive of a case in which the equities of the debtor's competitors could ever overcome the interests of the debtor and the debtor's employees.
>
> . . .
>
> The Bankruptcy Court did not accord the interests of Allied's competitors too little weight, for it is the opinion of this Court that under the facts of this unique case, Borman's and Chatham's interests were entitled to little or no weight in relation to the crucial and immediate interests of Allied and Allied's employees.

We agree with the district court that Borman's interest in Allied's application was insubstantial when compared to the interests of Allied and the unions. Thus, we hold that an employer's interest in holding another employer to the terms of a labor contract negotiated by a multiemployer bargaining unit need not be weighed when passing upon

applications to disaffirm executory labor contracts.[9] When such objections arise, the general rule which looks only to whether rejection would be advantageous to the debtor is properly applied.

Accordingly, the judgment of the district court is AFFIRMED.

---

[9] We note that in *Hotel Circle, supra*, the Ninth Circuit in approving the rejection of executory labor contracts specifically mentioned that Hotel Circle was a member of a multiemployer group which had negotiated the contracts in question. No consideration was given, however, to the harm the other employers might suffer if Hotel Circle was allowed to reject the contracts.

The insubstantiality of Borman's interests in Allied's applications becomes even more apparent when one considers that Allied always retained a right to withdraw from the multiemployer bargaining unit without the approval of the other employer members. Before the commencement of bargaining an individual member of a multiemployer bargaining unit may withdraw upon timely written notice to the union. *See, e.g., Retail Associates, Inc.*, 120 N.L.R.B. 388 (1958). After the multiemployer bargaining unit has commenced negotiations with a union, an individual employer may still withdraw where the union consents, *e.g., Hotel and Restaurant Employees*, 240 N.L.R.B. 757, 759 (1979), or where the employer faces "unusual circumstances" such as "evident economic hardship." *Spun-Jee Corp.*, 171 N.L.R.B. 557, 558 (1968). None of these recognized methods of withdrawal requires the approval of the other employer members of the multiemployer association. Here Allied both received the consent of the unions and faced extreme economic hardship.

District Court Memorandum Opinion and Order

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In The Matter of:

ALLIED SUPERMARKETS, INC.,
a Delaware corporation,
Debtor.

BANKRUPTCY
NO. 8-92871-H

BORMAN'S, INC., and
CHATHAM SUPERMARKETS, INC.,
Intervenor,

vs.

ALLIED SUPERMARKETS, INC.,
a Delaware corporation,
Debtor.

CIVIL ACTION
NO. 9-72019

MEMORANDUM OPINION AND ORDER

This is an appeal under 11 U.S.C. § 67[1] from a decision of a bankruptcy judge filed on behalf of two corporations engaged in the operation of supermarkets in the metropolitan Detroit area, Borman's Inc. (Borman's) and Chatham Supermarkets, Inc. (Chatham).

On November 6, 1978, Allied Supermarkets, Inc. (Allied), a competitor of Borman's and Chatham, filed a petition for arrangement under Chapter XI of the Bankruptcy Act. During the pendency of the proceedings in the Bankruptcy Court, Allied was authorized as debtor-in-

[1] This citation to Title XI of the United States Code, and all others in this opinion, refer to the statutory numeration prior to the Revised Bankruptcy Act of 1978. 11 U.S.C. § 101, *et seq.* The provisions of the Revised Act do not apply to this case which was commenced prior to the effective date of the new Act. *See* 11 U.S.C. Prec. § 101.

possession to continue the operation of its business and management of its property.

During the course of the proceedings, Allied prepared and submitted to the Bankruptcy Court for its approval a comprehensive "Business Plan", a proposal containing various elements relating to a restructuring of the business in order to augment its chances for survival and ultimately successful arrangement under Chapter XI. One of the principal elements of the plan, and the cause of this dispute, concerned the rejection of executory labor contracts and renegotiations with the affected employees through the collective bargaining process. The Business Plan was approved by the Creditors Committee (an elected oversight group of the approximately 10,000 unsecured creditors whose aggregate claims exceed seventy-five million dollars).

Prior to the submission of the Plan to the Bankruptcy Court, Allied had also entered into discussions with the affected unions,[2] and received tentative approval of the Business Plan particularly insofar as it pertained to the labor contracts in force. Discussions were also held with the employees and their union representatives for the purpose of explaining the scope and nature of concessions that were considered by Allied to be indispensable to the continuation of the business.

On Friday, March 23, 1979, Allied filed notices that hearings would be conducted the following Monday in the Bankruptcy Court on Allied's application for authority to reject the executory contracts with the three union locals

[2] The three locals involved, Retail Store Employees Union Local No. 36, Retail Store Employees Union Local 876, and Amalgamated Meat Cutters and Butcher-Workmen of North America Local 539, do not comprise all of Allied's union employees. One other local significantly involved in Allied's Michigan based division was Teamsters Local 337. Counsel for Teamsters Local 337 appeared during the course of the bankruptcy proceedings to advise the Court that Local 337 had not agreed to the proposed concessions and that Local 337 considered its collective bargaining agreement with Allied to be in effect.

which had considered and approved the concessions. Allied sought this rejection pursuant to Section 313(1) of the Bankruptcy Act, 11 U.S.C. § 713(1).[3] No notice of the scheduled March 26 hearing was given to Borman's or Chatham. However, on that day representatives of Borman's and Chatham appeared before the bankruptcy judge and requested that they be allowed to intervene, claiming that as parties to the collective bargaining contracts in question, their interests would be directly affected if the contracts were rejected. The bankruptcy judge allowed the interventions and after determining that two full days of discovery would be required for preparation by the intervenors, the bankruptcy judge rescheduled the hearings on Allied's application to March 30, 1979.

The Bankruptcy Court heard evidence relevant to Allied's application to reject the collective bargaining agreements on March 30 and March 31. The evidence presented at the hearing indicated that Allied had been incurring serious losses for a number of years in the fiercely competitive supermarket business. Allied's Chief Executive Officer, Earl W. Smith, testified that the corporation's losses in the period following the filing of its petition for arrangement totaled nearly $173,000 per week and that the financial condition of the corporation was so precarious that only the immediate and full implementation of the proposed Business Plan would permit Allied to remain in business. In Smith's view, a viable Business Plan would not be feasible absent the termination of Allied's existing collective bargaining agreements and a renegotiation of those contracts with significant concessions by the employees.

---

[3] This section provides:

"Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties conferred and imposed upon it by this chapter —

(1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate;"

All other interested parties, including the unions, either urged approval of the Plan or raised no objection to it, except for Borman's and Chatham. These two competitors introduced evidence that established that they along with Allied were participants in a multi-employer bargaining unit known as United Supermarket Association and that through that unit a standardized labor agreement had been negotiated. They then contended that the agreement was binding on all those corporations and could not be rejected without the approval of each or, alternatively, that rejection could not receive court sanction unless the interests of each participant was considered and weighed under the strict standard developed in the case law. *See Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698 (2nd Cir. 1975); *Brotherhood of Railway, Airline and Steamship Clerks* v. *REA Express, Inc.*, 523 F.2d 164 (2nd Cir. 1975), *cert. denied*, 423 U.S. 1017 (1975).

After the taking of testimony, the bankruptcy judge determined that Allied could disaffirm the three collective bargaining agreements. The Bankruptcy Court first noted that in the ordinary case the executory contracts of a debtor may be rejected under § 313(1) of the Bankruptcy Act merely on a showing that the disaffirmance would be advantageous to the debtor. Such a standard, the Bankruptcy Court ruled, does not apply where the contract sought to be rejected is a collective bargaining agreement. Instead, the bankruptcy judge adopted the balancing test prescribed by the *Kevin Steel* and *REA Express* cases, *supra*. Due primarily to Allied's bleak financial outlook absent a rejection of its collective bargaining agreements, the Court concluded that the evidence weighed in favor of the debtor and granted Allied's petition. In so doing, the Bankruptcy Court expressly rejected the arguments of Chatham and Borman's that their status as parties to a multi-employer unit required the Bankruptcy Court to consider their interests before acting under § 313(1). The bankruptcy judge held:

"The relationship, the contract, call it whatever you may, existing between Borman, Allied, and Chatham is under no stretch of the imagination a labor contract. There is no employer-employee relationship between the two.

It is not the type of collective bargaining agreement that 313 intended to exempt or give special treatment under Section 313."
Transcript, March 31, 1979, p. 5.

Borman's and Chatham have appealed from the ruling of the bankruptcy judge, contending initially that Allied was a member of a multi-employer bargaining unit. This being the case, appellants contend that the bankruptcy judge was required to "move cautiously in allowing rejection of a collective bargaining agreement". *Kevin Steel, supra* at 707. Specifically Borman's and Chatham claim that, as parties to a collective bargaining agreement, their interests and the interests of their employees should have been taken into account by the bankruptcy judge. Furthermore appellants assert that the bankruptcy judge misapplied the pertinent legal standard.

Allied disputes the contention that its participation in the United Supermarket Association created a multi-employer unit. However, even if it is determined to be a part of a multi-employer bargaining arrangement, Allied maintains that such a fact is irrelevant since only those labor contracts which directly affect the rights and obligations of an employer vis-a-vis its own employees are subject to the special rules laid out in *Kevin Steel* and *REA Express*.

The threshold question presented to this Court concerns the United Supermarket Association and the claimed existence of a multi-employer bargaining unit. The evidence taken in the proceedings before the bankruptcy judge indicates that for more than twenty years, Allied, Borman's and

Chatham have bargained with the Retail Clerks and the Meat Cutters unions through the United Supermarket Association (hereinafter U.S.A.). U.S.A. is not a corporation, nor has it filed under the Michigan assumed name statute; it has no board of directors, no by-laws and it collects no dues. U.S.A. appears to consist of a single labor consultant, Jack Bushkin, who has been U.S.A.'s designated agent for the negotiations of these contracts. Bushkin receives no compensation for his services from U.S.A., rather he is paid for his services by Allied, Borman's and Chatham, respectively and pro-rata.

The parties also introduced evidence concerning the procedures by which negotiated agreements between the unions and U.S.A. become binding collective bargaining agreements. Typically at the conclusion of negotiations, a handwritten memorandum setting forth the conditions agreed upon is drafted. This document is then signed by the union, Bushkin and a representative of each of the three corporations. This proposed agreement is then presented to the employees of Allied, Borman's and Chatham, and a ratification vote is taken. Ratification voting is union-wide, without regard to the particular employer. Thus, it is not even known whether, for example, a majority of union members employed by Allied ratified or rejected the proposed agreement.

When ratification is concluded, an agreement indicating U.S.A. to be the employer is executed. Also prepared at this time are identical agreements prepared by the union to be signed by Allied, Borman's and Chatham individually. Following ratification, each company administers the grievance and arbitration provisions of the contract individually.

Under that factual setting, it is necessary to determine whether the three supermarket competitors here constituted a multi-employer bargaining unit and, if so, the respective

interests and obligation of the members of the unit relative to this bankruptcy proceeding.

Multi-employer bargaining units are strictly voluntary, consensual organizations. *See Detroit Newspapers Association* v. *N.L.R.B.*, 372 F.2d 569, 570 (6th Cir. 1967); *N.L.R.B.* v. *Sklar*, 316 F.2d 145, 150 (6th Cir. 1963). The Sixth Circuit's observations in these two cases stressed the fact that employers may not be compelled to bargain in a multi-employer unit. However, it has been generally and consistently held that regardless of the formalities in its foundation, a multi-employer unit will be found to exist where there is demonstrated an unequivocal intention on the part of the constituent members to be bound by group action. *See McAx Sign Co., Inc.* v. *N.L.R.B.*, 576 F.2d 62 (5th Cir. 1978), *cert. den.*, 439 U.S. 1116 (1979); *Taylor Motors, Inc., et al.* 241 N.L.R.B. No. 113 (1979).

Allied here emphasizes the fact that U.S.A. is not formally tied to Allied, Borman and Chatham and possesses few of the characteristics of a formal organization. Allied points out that there is no written or oral agreement between the three corporations and that U.S.A. has no board of directors or by-laws. These facts, however, are not determinative. As explained by the Board in *York Transfer & Storage Co.*, 107 N.L.R.B. 139 (1953):

> "Under Board law, it is not a prerequisite for the establishment of an association-wide or multi-employer unit that there be evidence of an employer association with formal organizational structure, or that the members delegate to the association final authority to bind them, or that the association membership be nonfluctuating. The settled criterion for the inclusion of an employer in a multi-employer bargaining unit is whether the employer unequivocally intends to be bound in collective bargaining by group, rather than individual action. Thus, participation by an employer in group bargaining

provides such evidence of the employer's intention." *Id.* at 142 (footnotes omitted).

See also N.L.R.B. v. *Dover Tavern Owners' Association*, 412 F.2d 725 (3rd Cir. 1969); *Falkowski Grocery*, 236 N.L.R.B. 473 (1978); *The Kroger Comp.*, 148 N.L.R.B. 569 (1964).[4]

Thus the overriding consideration is whether Allied, Borman and Chatham intended to be bound by group bargaining, and as indicated in *York Transfer & Storage, supra*, the prior bargaining history is significant in assessing that intent. *See N.L.R.B.* v. *R. O. Pyle Roofing Co.*, 560 F.2d 1370 (9th Cir. 1977); *Krist Gray*, 121 N.L.R.B. 601 (1959); *Hi-Way Billboards, Inc.*, 191 N.L.R.B. 2 (1971). The prior bargaining history in the Detroit area supermarket industry supports the contention that the three corporations did intend to be bound by the agreements reached by U.S.A. Allied, Borman's and Chatham had a long history of bargaining as a unit through Bushkin and U.S.A. and there is no evidence in the record that any of the members of U.S.A. did not consider themselves a part of this association. Furthermore, the ratification procedures employed by the three corporations support the view that Allied, Borman's and Chatham were bound by group negotiations. *Bel Window*, 240 N.L.R.B. No. 161 (1979).

The testimony adduced in the proceedings before the bankruptcy judge satisfies the Court that Allied, Borman's and Chatham intended to be bound by group negotiations

---

[4] The Board's decision in *Kroger* is particularly apt for two reasons. First, it represents a decision by the Board regarding group employer negotiations without a formal association in the supermarket industry. Second, *Kroger* is also frequently cited for the proposition that a multi-employer bargaining unit may exist even if individual employers bargain separately on special matters. *See N.L.R.B.* v. *Sheridan Creations, Inc.*, 357 F.2d 245 (2nd Cir. 1966). Allied has cited evidence that each of the three corporations negotiated "side agreements" with various locals. Allied contends that this evidence negates any inference of group bargaining. The Board's opinion in *Kroger* suggests otherwise.

through the U.S.A. The Court therefore concludes that a multi-employer bargaining unit did exist here.[5]

That conclusion, of course, compels the further conclusion that Borman's, Chatham and Allied have mutual rights and obligations. It is not necessary to identify and define the nature and scope of those rights and obligations except insofar as they may relate to this unique context—the obligation by competitors to the rejection in a bankruptcy court of a collective bargaining agreement to which they are parties. There being no precedent presented to or found by this Court on this precise issue, it seems prudent to analyze and determine the issue by the use of analogy, logic and the application of general principles. The task is not an easy one considering the competing interests and conflicting policies involved. A good starting point, particularly since it describes an approach to these problems, is the experience of the Second Circuit in *Kevin Steel, supra*, and *REA Express, supra*.

Kevin Steel Products, Inc. filed a petition for arrangement under Chapter XI of the Bankruptcy Act in September, 1973. After it was authorized to operate its business as debtor-in-possession, Kevin Steel moved for rejection of its collective bargaining agreement with the union under § 313(1) of the Bankruptcy Act. The bankruptcy judge granted the petition, but this decision was reversed by the District Court which held that the policies of the National

---

[5] One final factor which has been stressed before the Court on the question of the existence of a multi-employer unit is the unions' views of whether U.S.A. was a multi-employer association. Unfortunately, the one local which has addressed this issue has not been completely consistent in its treatment of the status of U.S.A. In the Bankruptcy Court proceeding, Horace Brown, President of the Retail Store Employees Union Local 876, testified that U.S.A. was a multi-employer bargaining unit. However, in pleadings filed on behalf of Local 876 in another case filed in this District, counsel for Local 876 has denied that U.S.A. is a multi-employer unit. *See* Defendant's Answer in *Borman's Inc. v. Retail Store Employees Union, Local 876*, Civ. No. 79-79074 (E.D. Mich.).

Labor Relations Act prevented the disaffirmance of a collective bargaining agreement. *Shopmen's Local No. 455* v. *Kevin Steel Products*, 381 F.Supp. 336 (S.D. N.Y. 1974).

On appeal the Second Circuit was presented with the apparent: inconsistency between the Bankruptcy Act and federal labor law. Kevin Steel argued that the literal language of § 313(1) of the Bankruptcy Act allowed the bankruptcy judge to authorize the rejection of any executory contract, including labor agreements.

The Union and the National Labor Relations Board argued in the Court of Appeals that § 313(1) must be interpreted in light of conflicting statutory provisions. Specifically, it was urged that a literal construction of § 313(1) would conflict with § 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), which provides that no party to a collective bargaining agreement may terminate or modify such a contract absent compliance with certain specified procedures.[6] The Union and the Board argued that, because

---

[6] Section 8(d) provides in pertinent part:

"the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later;"

of the peculiar status of a collective bargaining agreement, and due to the general labor law policy of preserving industrial peace, the Labor Act had to be given preeminence in this confrontation with the Bankruptcy Act.

The Second Circuit reviewed the relevant legislative history and existing case law and concluded the District Court erred in holding that collective bargaining agreements could never be disaffirmed in bankruptcy. The Court first ruled that there was no conflict between § 313(1) of the Bankruptcy Act and the N.L.R.A. The Court reasoned that a debtor-in-possession was a "new juridical entity" with its own rights and duties and is no longer a "party" to a collective bargaining agreement under Section 8(d). The Court thus viewed the debtor-in-possession as a successor to the pre-bankruptcy company, and as a successor, was required to bargain with union representatives, but was not bound by the pre-existing labor agreement. *See N.L.R.B. v. Burns International Security Service, Inc.*, 406 U.S. 272, 281-291 (1972); *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249 (1974). The Court concluded § 313(1) could be the basis for the rejection of a collective bargaining agreement.

The Second Circuit then addressed the standard which should be utilized in rejecting such contracts in light of the policy arguments advanced by the union and the board in favor of continuity in collective bargaining agreements. The Court held that the usual standard for the rejection of ordinary executory contracts, which requires only the finding that disaffirmance would be favorable to the debtor, would not completely protect the interrelated policy interests. The Court therefore adopted language from *In Re Overseas National Airway*, 238 F.Supp. 359, 361-362, where it was held that rejection of a collective bargaining agreement should be allowed:

> "only after thorough scrutiny, and a careful balancing of the equities on both sides, for, in relieving a debtor from

its obligations under a collective bargaining agreement, it may be depriving the employees affected of their seniority, welfare and pension rights, as well as other valuable benefits which are incapable of forming the basis of a provable claim for money damages. That would leave the employees without compensation for their losses, at the same time enabling the debtor, at the expense of the employees, to consummate what may be a more favorable plan of arrangement with its other creditors." 519 F.2d at 707.

Within weeks after the *Kevin Steel* case, the Second Circuit was again called upon to consider a petition for rejection of a collective bargaining agreement under the Bankruptcy Act in *REA Express, supra*. This case arose out of a corporate debtor's attempt to reject a collective bargaining agreement which was subject to the provisions of the Railroad Labor Act (RLA), 45 U.S.C. § 151 *et seq.*[7] The Court reaffirmed the *Kevin Steel* holding that collective bargaining may be rejected by the Bankruptcy Court in the proper circumstances. The *REA Express* Court then further elaborated on the tests to be used by the Court in determining whether disaffirmance was appropriate. The Court stated:

"where, after careful weighing of all of the factors and equities involved, including the interests sought to be protected by the RLA, a district court concludes that an onerous and burdensome executory collective bargaining agreement will thwart efforts to save a failing carrier in bankruptcy from collapse, the court may under § 313(1) authorize rejection or disaffirmance of the agreement." *Id.* at 169.

---

[7] Section 2 of the RLA, 45 U.S.C. § 152, seventh, is comparable to § 8(d) of the L.M.R.A., preventing any alterations of the substantive provisions of a collective bargaining agreement except in the manner prescribed in the agreements themselves or in the RLA, *see* 45 U.S.C. § 156.

The Court also explained the standard in this way:

> "in view of the serious effects which rejection has on the carrier's employees it should be authorized only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the carrier will collapse and the employees will no longer have their jobs." *Id.* at 172.

The principles discussed in these two Second Circuit decisions have been addressed by other federal courts in subsequent cases which have generally identified a two part test: (1) Is the labor contract onerous and burdensome? (2) Do the equities involved balance in favor of the debtor? *See Local Joint Executive Board, AFL-CIO* v. *Hotel Circle*, 419 F.Supp. 778 (S.D. Cal. 1976) *aff'd* 613 F.2d 210 (9th Cir. 1980); *Bohack Corp.* v. *Truck Delivery Local Union No. 807*, 431 F.Supp. 646 (E.D. N.Y.) *aff'd* 567 F.2d 237 (2nd Cir. 1977), *cert. denied* 439 U.S. 825 (1978); *In Re Alan Wood Steel Co.*, 449 F.Supp. 165 (E.D. Pa. 1978); *In Re Studio Eight Lighting*, 91 L.R.R.M. 2429 (E.D. N.Y. 1976). In each of these cases an interested union had attached an employer's attempt to reject a collective bargaining agreement in bankruptcy, and in each of these cases the Court adopted the *Kevin Steel* and *REA Express* conclusion that § 313(1) does give the court authority to disaffirm collective bargaining agreements.

The factual setting of the above cases points out the uniqueness of the case at bar. Here, the unions have not objected to Allied's petition to reject its collective bargaining agreements. On the contrary, the union was presented with the labor concessions embodied in Allied's business plan prior to the filing of Allied's petition, and the Business Plan's proposals were approved by a vote of the locals involved. These locals were represented at the proceedings before the Bankruptcy Court on Allied's application for authority to reject its collective bargaining agreement, but

the unions interposed no objections to Allied's request. Allied's competitors have, however, challenged Allied's ability to disaffirm these contracts, based on the existence of a multi-employer bargaining agreement.

Before proceeding to an analysis of the arguments submitted to the Court, it is important to note an issue which is apparently not in dispute. All of the parties to this appeal have accepted the holdings of the Second Circuit in *Kevin Steel* and *REA Express* to the effect that, in some circumstances, rejection of a labor contract is appropriate. Borman's and Chatham have not reiterated the arguments raised by the union and the board in *Kevin Steel* by claiming that no collective bargaining agreement may ever be rejected under § 313(1) of the Bankruptcy Act. On the other hand, Allied has not seen fit to argue that the accepted standard for the disaffirmance of executory contracts generally must also govern the rejection of collective bargaining agreements. The parties therefore agree that the holdings of *Kevin Steel* and *REA Express* are correct, and the Court joins the parties in this conclusion.[8] The parties do, however, disagree completely on the application of the *Kevin*

[8] This is not meant to suggest that the Second Circuit's decisions in *Kevin Steel* and *REA Express* have completely escaped criticism. Such is not the case, particularly with regard to the Court of Appeal's attempt to resolve the apparent conflict between the Bankruptcy Act and the N.L.R.A., based on the conclusion that the debtor-in-possession constitutes a new juridical entity. *See, e.g.*, Note 51 N.D.L.Rev. 819, 829 (1936); Note 22 Wayne L.Rev. 165, 172 (1975); *see also* Comment, "Collective Bargaining and Bankruptcy," 42 S.Cal.L.Rev. 477 (1969). This criticism is perhaps best borne out by the fact that the Second Circuit has since recognized that its "new juridical entity" theory does not easily translate in other areas of bankruptcy law. The Second Circuit has, in fact, found it necessary to confine the application of that theory to the precise fact situation presented in *Kevin Steel* and *REA Express*. *See In the Matter of Unishops*, 543 F.2d 1017, 1018-1019 (2nd Cir. 1976); *Truck Drivers Local Union No. 807 v. The Bohack Corp.*, 541 F.2d 312, 319 (2nd Cir. 1976). Nevertheless, the Court is persuaded by the carefully considered opinions in *Kevin Steel* and *REA Express* as to the accommodation of the competing statutory interests involved.

Steel and *REA Express* standards to the unique fact situation presented here.

In appellants' view, the Bankruptcy Court misperceived the tests laid out in the Second Circuit opinions. Borman's and Chatham assert that negotiated wage terms may be disaffirmed only if they are "*unusually* high, onerous and burdensome." *In Re Studio Lighting Co., supra.* This, they argue, is not the case here since Allied, Borman's and Chatham were parties to a unitary collective bargaining arrangement. Appellant's perception of the equities which the bankruptcy judge was charged to weigh under *Kevin Steel* and *REA Express* also differs significantly from that of Allied. They content that the bankruptcy judge was required to consider the effects of Allied's disaffirmance on Borman's and Chatham—the other two parties to the collective bargaining agreement. Thus appellants' attack as erroneous the bankruptcy judge's failure to consider the interests of appellants and their employees, and his decision, based on his allegedly incorrect view of the equities to be weighed to exclude certain evidence which appellants consider relevant.[9]

The initial question which the Court must address concerns the application of *Kevin Steel* and *REA Express* to the facts of this case. As noted above, once the Second Circuit in *Kevin Steel* had determined that collective bargaining agreements could be rejected under § 313(1), the Court then

---

[9] Appellants have cited two evidentiary rulings of the bankruptcy judge as erroneous. During the testimony of Earl Smith, Allied's Chief Executive Officer, counsel for Borman's attempted to cross-examine on the feasibility of Allied's proposed Business Plan. This evidence was relevant in appellants' opinion based on their perception of the equities to be balanced by the Bankruptcy Court. *See* discussion, *infra*, Page 21. Similarly, appellants have asserted that portions of the testimony given by Dr. Mark Kahn, an industrial expert called by Borman's, which was submitted on a separate record after the bankruptcy judge sustained Allied's relevancy objection, were relevant and should have been considered. Dr. Kahn's excluded testimony dealt with the impact of Allied's rejection of its multi-employer contracts upon Borman's and Chatham.

turned to the standard for rejection which should be employed. The Court cautioned that a more careful scrutiny of the application for rejection was in order in these cases because the traditional standard for rejection of a non-labor contract "totally ignores the policies of the Labor Act and makes no attempt to accommodate them". *Id.* at 707. These broad policies underlying the Labor Act and their application to the instant case provide an appropriate starting point for the Court's discussion.

The United States Supreme Court has noted that multi-employer bargaining is "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *N.L.R.B.* v. *Truck Drivers Local Union No.* 449, 353 U.S. 87, 95 (1957). It has therefore been held that, to achieve these policy goals, an employer who is part of a multi-employer bargaining unit is bound by the terms of the negotiated contract. *Universal Insulation Corporation* v. *N.L.R.B.*, 361 F.2d 406, 408 (6th Cir. 1966). These cases suggest that the same policies favoring labor peace which compelled the Second Circuit to adopt a stricter standard for the rejection in bankruptcy of employer/employee collective bargaining agreements, mandate that a similar approach be used in cases such as the one at bar. Nevertheless, this Court is reluctant to apply the stricter standard for rejection found in *Kevin Steel* and *REA Express* merely on the basis of appellants' arguments that, like Second Circuit cases, this one involves a labor contract.

The Court is particularly concerned that the important policies of the Labor Act which persuaded the Second Circuit to forge its stricter standard, may not be as serious a consideration in the instant case. It is of course true that the paramount goal of the Labor Act is to preserve industrial peace. *See N.L.R.B.* v. *Burns Security Services, supra,* but where, as here, the union is fully advised of the debtor's intent to reject the contract, is represented at the

proceedings held in connection with the application to reject, but does not object, the possible disruption of labor peace is minimized. The Bankruptcy Court ruled and Allied has urged that because no employer employee relationship is at issue here, the Court need not employ the stricter standards enunciated in *Kevin Steel* and *REA Express*. In this Court's opinion there is merit to this argument.

It seems clear that the industrial peace which the *Kevin Steel* Court thought was threatened by rejection of the collective bargaining agreements involved the relationship of an employer to its employees. Thus the principal policy argument advanced by the Board in Kevin Steel focused on the effects of disaffirmance on industrial peace due to the union's potential response to the rejection. The Board opined that "permitting rejection at the expense of employees impairs peace, since the only means employees have to protect against the losses they will suffer in such a situation is a strike." *Id.* at 703. The *Kevin Steel* Court's formulation of the equities to be balanced in such situations also indicates the Second Circuit's concern that employer/employee relations might be adversely affected by rejection of collective bargaining agreements, for the Court, citing *In Re Overseas National Airways, supra*, suggested that some weight be given to the employees' rights under the contract. Likewise, the Court in *REA Express* found that the purpose of the Railroad Labor Act is to avoid disruptions of commerce due to "self-help, strikes, and unilateral action" on the part of the union.

The Court is therefore not completely convinced that the policies of the Labor Act combating disruptions of the industrial peace are as forceful in the context of this case. The Court acknowledges that appellants are parties to the collective bargaining agreement which was rejected and that there is ample evidence in the record supporting appellants' view that Allied's rejection of its collective bargaining agreement could have a detrimental effect on Borman's and

Chatham's business prospects, but the Court is not persuaded that this constitutes the type of threat to industrial peace which formed the basis of *Kevin Steel* and *REA Express*.

Having stated these preliminary concerns, the Court will next address the claims of error made by appellants. Several arguments advanced by appellants involve a misapplication of the tests used in *Kevin Steel* and *REA Express*, and would be rejected even under the stricter standard found in those two cases. Appellants first point out that under *Kevin Steel* and *REA Express*, a decision to reject a collective bargaining agreement "should not be based solely on whether it will improve the financial status of the debtor." Instead there must be proof that the labor contracts are onerous and burdensome. Relying on the District Court's opinion in *In Re Studio Lighting*, appellants argue that the collective bargaining agreement must contain terms which are *unusually* onerous and burdensome. *Id.* at 2431. Since no such evidence was, or could be, submitted in this litigation, appellants claim error.

This contention, however, misperceives the Second Circuit's use of the term "onerous and burdensome". That Court did not contemplate a comparative approach to the determination of the impact of the collective bargaining agreements on the debtor; rather the language used in these two cases suggests that the finding of "onerous and burdensome" was tailored to the precise financial situation of the debtor, and specifically to the debtor's prospects for survival absent the disaffirmance. In *REA Express* the Court concluded that a collective bargaining agreement could be rejected "if [the debtor's] collective bargaining agreements with the unions . . . are too onerous and burdensome to permit it to survive . . ." *Id.* at 169. This principle has been repeated in a number of cases following *REA Express*, *see Bohack Corp. v. Local Union No. 807*, *supra* at 650; *Matter of Alan Wood Steel Co.*, *supra* at 169, and indeed,

this same language was used in *In Re Studio Lighting*, *supra* at 2430, the case on which appellants rely. The Court therefore concludes that appellants' contention that the Bankruptcy Court was required to find that Allied's labor contracts were somehow more burdensome on it than on its competitors, is not supported by the case law. The proper standard must be based on the ultimate effect of the collective bargaining agreement on the debtor-in-possession.

Appellants next argue that the Bankruptcy Court was not presented with sufficient evidence concerning the impact of the then existing labor agreements or Allied's viability as a business. It is asserted that the only evidence relevant to this issue which was presented to the bankruptcy judge was the conclusory statement of Earl W. Smith, Allied's Chief Executive Officer, that rejection of the contracts was necessary if the Business Plan was to succeed.

This argument, however, does not give a completely accurate portrayal of Smith's testimony. Smith stated not only that rejection of the collective bargaining agreements was necessary to implement the Business Plan, but also that, without a rejection of these contracts, Allied could not survive. Transcript, pp. 62-63. There is, furthermore, sufficient circumstantial evidence to support Smith's conclusion. The evidence taken by the Bankruptcy Court showed that in the four preceding years, Allied had suffered losses of approximately $45 million and following its arrangement under Chapter XI, the corporation was losing nearly $173,000 per week. Further, the testimony indicated that Allied would fail unless the Business Plan was put into effect and that a crucial component of the Business Plan was the anticipated labor concessions which were to follow the rejection of the contracts.[10] These facts, when com-

[10] Circumstantial evidence in support of the conclusion that Allied would fail without a modification of its labor contracts can also be found in the positions of the unions involved. The rejection and renegotiation of the contracts would have an immediate adverse impact on the unions, but they nevertheless did not object to Allied's application to reject.

bined with the undisputed evidence that labor costs constituted a significant portion of operating expenses of a business in the supermarket industry, provide ample support for the conclusion reached by Allied's Chief Executive Officer and the determination made by the Bankruptcy Court.

In his testimony, Smith stated repeatedly that the proposed Business Plan would save Allied only if all of its aspects were approved. Appellants now argue that in the cross-examination of Allied's Chief Executive Officer it was conclusively demonstrated that the Business Plan was premised on several assumptions. Appellants therefore assert that under *Kevin Steel* and *REA Express*, the debtor was required to demonstrate that rejection of the labor agreements is essential to its survival. In appellants' view, this standard mandates that the debtor should not be allowed to disaffirm its collective bargaining agreements unless it is shown that only disaffirmance would assure the debtor's survival. Thus, the argument concludes, since the assumptions underlying the proposed Business Plan cast some doubt on Allied's future regardless of whether these labor contracts were rejected, the Bankruptcy Court should have considered the feasibility of Allied's Business Plan before reaching a decision on Allied's application to reject its labor agreements.

Appellants' argument on this point is not persuasive. The question which had to be addressed by the Bankruptcy Court under *Kevin Steel* and *REA Express* was whether the collective bargaining agreement then in effect would thwart efforts to save a failing debtor from collapse. As noted above, this fact was established. It may well be true that several other contingencies had to occur before full implementation and the ultimate success of the Business Plan could be assured, but this certainly does not compel the conclusion that Allied was foreclosed from beginning its attempt to comply with the Business Plan by rejecting these

important contracts.[11] The debtor was required under the cases to prove that, absent a rejection of the collective bargaining agreement, its business would fail. The debtor is not required to guarantee to the Bankruptcy Court that following its rejection of the contracts, its business would be successful.

Finally, Allied asserts that the Bankruptcy Court should have considered the interests of all parties to the collective bargaining agreements in making its determination to reject.[12] The balancing of the equities, as prescribed in *Kevin Steel* and *REA Express* should have included in appellants' view, those of Borman's and Chatham as well as the employees of Allied's two competitors. Borman's and

---

[11] In this Court's opinion, Appellants' claim that the bankruptcy judge should have considered the feasibility of Allied's Business Plan before deciding the petition for rejection turns the labor policy concern expressed in *Kevin Steel* and *REA Express* on its head and gives further proof of the Court's previously expressed view that the stricter standard contained in the Second Circuit cases does not necessarily apply here. In *Kevin Steel* and *REA Express*, the Court balanced the interests of the debtor-in-possession against the interests of its employees who may be deprived of their "seniority, welfare and pension rights, as well as other valuable rights". Here the debtor confronted the union with a proposal for modification of the collective bargaining agreement prior to the filing of its application for rejection. The union, mindful of its rights under the contract, but also aware of the resulting loss of jobs if the debtor should fail, chose to acquiesce in the application for rejection. However, the debtor's competitors, parties to a multi-employer agreement, seek to override the compromises reached by the debtor and its employees due to the competitor's conclusion that the compromise so reached would ultimately fail anyway. If appellants' view on this question were accepted by the Court neither the policies of the Bankruptcy Act—"to preserve the funds of the debtor for distribution to creditors and to give the debtor a new start" *Kevin Steel*, p. 706—nor of the Labor Act would be served.

[12] There is some dispute between the parties whether the bankruptcy judge did or did not consider the interests of Borman's, Chatham and the employees of these two companies in reaching its decision. There are portions of the bankruptcy judge's opinion which suggest that the interests of Allied's competitors did enter into the Court's balancing. *See* Transcript, Opinion of the Court, p. 14. Appellants claim that the Court misapplied its standards is, however, further supported by the evidence which the bankruptcy judge refused to admit. *See* footnote *, *supra*.

Chatham have demonstrated that the supermarket industry is extremely competitive, particularly in the Detroit area, with a precarious balance between profit and loss for all of the corporations involved. Because of the conceded importance of labor costs to the overall expenditures in this industry, appellants maintain that even a modest adjustment of Allied's employees' wage and fringe benefit rates would have a significant impact on Allied's competitors. Appellants therefore contend that their rights and the interests of their employees should have been included in the Bankruptcy Court's balancing equation.

As stated previously, the Court has reservations regarding application of the *Kevin Steel* and *REA Express* tests to the facts of this case. Furthermore, even if the rights and interests of Allied's competitors were to be considered here, the Court would have serious concern about granting these interests any significant weight in comparison with Allied's interest and the interest of Allied's employees. Accepting the evidence which was presented to the bankruptcy judge, the direct and primary result of Allied's inability to reject these contracts is that Allied fails and its employees are jobless. On the other hand, if Allied is allowed to disaffirm these contracts and it receives certain concessions from its employees in subsequent contract negotiations, Allied's competitors may indirectly be adversely affected.[13] In such a situation, the Court finds it difficult to conceive of a case in which the equities of the debtor's competitors could ever overcome the interests of the debtor and the debtor's employees.

---

[13] The Court recognizes that Borman's and Chatham have argued that their interests as well as those of its employees should be considered. The Court would further agree that if these two corporations are seriously injured financially that this might ultimately impact on their employees. Nevertheless, the argument on behalf of Borman's and Chatham employees loses some of its force in light of the fact that these workers were represented in the proceedings before the Bankruptcy Court through their union.

These observations lead the Court to conclude that the bankruptcy judge's treatment of these issues does not constitute error. This Court, unlike the bankruptcy judge, has concluded that Borman's and Chatham were parties to a multi-employer bargaining agreement along with Allied, but such a conclusion does not compel the Court to reject the decision of the bankruptcy judge. The Bankruptcy Court did not accord the interests of Allied's competitors too little weight, for it is the opinion of this Court that under the facts of this unique case, Borman's and Chatham's interest were entitled to little or no weight in relation to the crucial and immediate interests of Allied and Allied's employees.

One final issue must be addressed by the Court. Chatham has claimed that the procedures followed by the bankruptcy judge in the week preceding the hearing on Allied's application violated the corporation's due process rights to a fair hearing. Chatham was notified orally on Friday, March 23, 1979 that Allied had rescheduled a hearing on its petition for rejection on March 26. Chatham appeared in Court on March 26 and was permitted to intervene. The hearing was then rescheduled for Friday, March 30, 1979. On March 28 and March 29 counsel for Allied, Borman's and Chatham participated in the taking of a number of depositions. The hearings before the bankruptcy judge commenced on March 30, and at the end of the trial, counsel for Chatham requested additional time to submit a brief, but this request was denied. Chatham now claims that the speed with which this complex piece of litigation was brought to a hearing and decided by the bankruptcy judge violated the fundamental motions of notice and hearing guaranteed by the Due Process Clause of the Fifth Amendment.

At the conclusion of the proceedings on March 26, 1979, after the Bankruptcy Court considered the written and oral presentations of Borman's in support of its motion to intervene, filed by Borman's counsel, a colloquy took place

between counsel and the bankruptcy judge regarding the schedule for depositions, briefing and hearings. (Transcript, March 26, 1979, pp. 58-66.)

The record indicates that all parties to this litigation were concerned with obtaining an expedited hearing on Allied's application for rejection. However, the record further demonstrates that the Bankruptcy Court attempted to insure that such a hearing would not be conducted at the expense of appellants' due process rights. Thus, before rescheduling the hearing on Allied's petition, the Bankruptcy Court requested Borman's view of the time which would be necessary to prepare for such a hearing. Chatham did not dissent from the request of Borman's counsel for two days of discovery. In such circumstances, this Court is unable to conclude that Chatham was denied due process in the Bankruptcy Court as a result of the schedule adopted by the Court on March 26, 1979. Nor does the Court consider it error for the Bankruptcy Court to have decided the ultimate issues on the basis of the record without the supplementary briefs which appellants offered to prepare. The record indicates quite clearly that the limited number of cases involving the rejection of collective bargaining agreements had been presented to the bankruptcy judge before it rendered its decision, but as the Court ruled in its oral opinion following full arguments on this question, these cases were unavailing for appellants. It bears repeating in the unique factual context of this case that "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961). This Court is unable to conclude on the record before it that Chatham was denied due process by the actions of the bankruptcy judge.

The Court therefore finds no error in the bankruptcy judge's decision to allow Allied to disaffirm its labor contracts and there there is no error in the procedures

employed by the bankruptcy judge in reaching that decision. For the foregoing reasons, the appeal is DISMISSED.

IT IS SO ORDERED.

(s) PHILLIP PRATT
United States District Judge

Dated: Sept. 3, 1980
Detroit, Michigan

District Court Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In The Matter of:

ALLIED SUPERMARKETS, INC.,
a Delaware corporation,
Debtor.

BANKRUPTCY
NO. 8-92871-H

BORMAN'S, INC., and
CHATHAM SUPERMARKETS, INC.,
Intervenor,

vs.

ALLIED SUPERMARKETS, INC.,
a Delaware corporation,
Debtor.

CIVIL ACTION
NO. 9-72019

JUDGMENT

The above-entitled matter having come before the Court on Borman's, Inc., and Chatham Supermarkets, Inc. appeal from a decision of the Bankruptcy Court; and the matter having been considered on oral argument and briefs of counsel and the Court having filed its written Opinion herein.

IT IS ORDERED that the appeal be and it hereby is DISMISSED.

(s) PHILIP PRATT
United States District Judge

Dated: September 3, 1980
Detroit, Michigan

UNITED STATES OF AMERICA
IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION
IN BANKRUPTCY

In the Matter of: ALLIED SUPERMARKETS, Inc., a Delaware corporation, *Debtor-In-Possession.*	In proceedings for an arrangement under Chapter XI. No. 78-92871-H

Proceedings had in the above-entitled matter before the Honorable Harry G. Hackett, Bankruptcy Judge, at Detroit, Michigan, on Saturday, March 31, 1979, commencing at 10 o'clock A.M.

APPEARANCES:

IRVING A. AUGUST, Esq.,
SHELDON S. TOLL, Esq., and
DAVID MIKESELL, Esq.,
Attorneys for the Debtor Corporation.

EUGENE DRIKER, Esq., and
HERBERT SOTT, Esq.,
Attorneys for Borman's Inc.

[3]

Detroit, Michigan
Saturday, March 31, 1979
9:30 o'clock A.M.

OPINION OF THE COURT

THE COURT: I will again give you my conclusions and my reasons for them and I don't think I am going to surprise anybody in here.

As you have heard so many, many times today, this controversy has its genesis in Section 313 of the Bankruptcy Act which reads as follows:

"Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it—

"(1) permit the rejection of an executory contract of the Debtor, upon notice to the parties to such contracts, and to such other parties in interest as the court may designate;

"(2) upon such notice as the court may prescribe and upon cause shown, authorized the Receiver or Trustee"—

that has nothing to do with this.

Usually the Court will start with the facts, come to the law. I propose to attempt to do, make—draw [4] my conclusions in a little bit different way.

The Court has previously pointed out that in the case of executory contracts other than those involving collective bargaining units, the only issues before a court of bankruptcy is whether or not there is an executory contract in existence and whether disaffirmance would be advantageous to the Debtor.

It does not consider whether a party—whether the other party to the contract is injured or not. That is of no consequence to Section 313 and the intent of Congress, they have completely ignored that.

All right.

Now we have had considerable testimony on the relationship between Allied, Borman and Chatham and I think it has caused some confusion and the confusion is in the present rights of Chatham and Borman as opposed to any future rights or any rights they might have which might result from the rejection of these executory contracts.

Well, what do I mean by that?

You have previously heard the Court say that in all instances other than collective bargaining instances, any party to a contract with one who files a Chapter XI proceeding or files bankruptcy, the only issue [5] or the only issues in determining whether the contract should be re-

jected: Is the contract executory and, (2) would it be advantageous to the Debtor.

The relationship, the contract, call it whatever you may, existing between Borman, Allied, and Chatham is under no stretch of the imagination a labor contract. There is no employer-employee relationship between the two.

It is not the type of collective bargaining agreement that 313 intended to exempt or give special treatment under Section 313.

The type of contract that is entitled to special consideration under Section 313 is the contract or the agreement between the local unions in question here, the collective bargaining and in considering whether or not to reject, to permit rejection or to refuse rejection, the Court must look: Are the contracts executory? Will it be of an advantage to the Debtor, or, put another way, is the contract onerous or burdensome to the Debtor?

Or to put it another way, does the existence or the continuance of the contract thwart rehabilitation of the Debtor?

And the next issue, the Court must look and must protect and balance the equities and consider the [6] welfare of the members of the collective bargaining unit.

Putting it another way, to be more specific, what good is this going to do the Debtor in relationship to the harm that it is going to do to these people who are members of this collective bargaining agency?

That is the policy set by Congress and the Labor Laws, whether it be the Norris-LaGuardia or the National Labor Relations Act.

That is the labor policy and that is what this Court must adhere to.

Now, as pointed out previously, the Debtor here certainly had the option to delay this procedure and wait until it could formulate a plan as Chatham would have it do, formulate a plan of arrangement, make the deposit, obtain acceptance from all the creditors, get a hearing on confirmation.

The length of time that this would entail the Court at this time is in no position to tell you.

Certainly there are factors to be considered.

How does the creditors committee feel?

Unquestionably it would entail delay.

This is what Chatham at least would ask me to do and deprive and deny the Debtor in possession of a [7] right to reject these executory contracts under circumstances when they have the right to reject them in order to protect their rights.

Oh, the Court may have the discretion, but to exercise it would be abuse of discretion which would be reversible error.

Based upon what the Court has heard here by way of testimony as to the financial plight and the losses being suffered by this Debtor, it would place this Debtor's future existence and continued existence in considerable peril or, at the very least, it would appear from that testimony that it would impose unnecessary losses upon the secured and unsecured creditors of this estate.

For every dime that this Debtor suffers in losses, it is passed on to the creditors.

Of course, as the Court previously pointed out, that is another matter which the Debtor could have resorted to and the Court submitted several questions to those who opposed the rejection of these contracts and one was the consideration that if it came to adjudication, could there be any conceivable way that either the Chatham and Borman, or for that matter, the collective bargaining units could avoid the rejection of these contracts if [8] liquidation ensued.

Well, of course not, and the Court has previously applied somewhere in its comments what would happen if the Debtor selected the alternate plan by submitting a plan and rejecting these executory contracts.

There are very limited things that the Court can consider and whether to confirm it.

And if the Court confirmed it after it having been accepted, it effectively would reject the executory contracts under either procedure.

If Borman and Chatham have executory contracts with the Debtor, they are entitled to be compensated for any injuries or damages that they suffer as a result of the rejection of these contracts.

That is a right, distinct and totally and entirely different than any other rights they might have involving the right of the Debtor in possession to have these executory contracts rejected.

The Court has cited several cases and the Court repeats that the only instance wherein the Court must consider the other party to an executory contract in rejection proceedings under Section 313 as in the instance when that party is a collective bargaining unit, the Court realizes that it must balance the equities and [9] look at the rights of the Debtor's employees as to how it will affect them.

Let's go to the facts.

What do the facts show here?

The facts clearly show, and I agree with Mr. August, that quite a bit of time was consumed in laying a foundation with a historical background relating to the trials and financial difficulties of the Debtor, Allied.

It is not a very pleasant story.

It has been recounted how within the last four years, approximately four years, there has been some $43 million in losses.

He has recounted the many efforts that the Debtor through its management, the different programs that it has instituted to correct those shortcomings.

Finally, they could not avoid to do any more.

They came to the place of last resort.

The testimony shows here, indeed, and I have to accept it, it is uncontroverted that there are losses of $173,000.00 per week.

The testimony here has demonstrated that with the rejection of these executory contracts, those losses will be on an escalated scale, will be gradually [10] reduced where they will reach the point where they will eliminate $110,000.00 a week of those losses.

The testimony further shows that the Debtor has continued to utilize whatever means it can to cut its losses, including freezing the wages and benefits of its non-union employees and of its executive employees.

I am fearful I will now have to make—refer to some of my notes.

Yes.

The testimony clearly shows here that approximately 75—65 to 70 percent of the Debtor's cost of operation is attributable for labor, the cost of labor.

What better place to start than to attempt to make some adjustments in that area?

Although the testimony does not definitely show, in fact I think the testimony showed to the contrary that the Debtor has not limited its efforts to this particular area. It has taken this in conjunction.

The Debtor has assured the Court, and I think the testimony, it is there, I can't change it, it is recorded, the die is cast, that if these contracts are not rejected, that this Debtor will eventually become [11] the victim of liquidation. It will no longer exist as a going business.

As I indicated to you, Mr. August and Mr. Driker, they have suggested to the Court that—well, Mr. August that Mr. Driker and his clients, Chatham and Borman, were over here to put them out of business.

And Mr. Driker said that Mr. August by getting an unfair advantage by these labor breaks will put them out of business.

Well, I am not convinced that Mr. August's labor breaks will put them out of business.

The way I look at it, either one of you, and the way you eventually confessed did not intend any harm or any ill will or fate to the other.

I don't think either one of you would spend appreciable time weeping if either were overtaken by some economic ill fate.

It is a natural thing for people to want to lessen competition, but that is not the basis upon which the Court must decide to either reject or refuse to reject these executory contracts.

They simply have no bearing and, again, I come back to the proposition: Is it—are these contracts onerous and burdensome?Will they prevent the [12] rehabilitation of the Debtor and what effect will their rejection have on the employees of Allied.

All right.

Here are the concessions that—there has been absolutely, as has been shown, no wage reduction, nor any advantage that Allied will obtain from the rejection of these contracts and the adoption of the proposed business plan here.

There will be no wage increase. They continue all of the fringe benefits as we call them.

Now where they really gave you the advantage or a competitive advantage is that at the expiration of these collective bargaining agreements, Chatham and Borman may have to pay more.

It is conceivable that they may have to lay off some of their employees in order to effect economies, but I don't have any evidence as to how many they would have to lay off.

They belong to the same bargaining unit.

But now am I to sit and guess and take into consideration the employees of Chatham, all of the people of the U.S.A., and I mean the United Supermarket Association, taking into account the benefit or detriment that will inure

to the employees of all of the members of [13] that bargaining—multiple bargaining unit.

There is nothing here to prove that they are not better off as a whole on the rejection than they are under the remaining—by remaining in force and effect.

In fact, I think the testimony tends to show and will justify a conclusion that without rejection of these three bargaining units, there will be 4,500 jobs less if the Court doesn't reject.

The Court specifically finds that no testimony demonstrates here that the equities in favor of rejection, at least insofar as the welfare of the members of these bargaining units, whether they be employees of Chatham, Borman or Allied, it is in their best interest and the equities preponderate on the side of rejection, not on the side of refusal to reject.

As the evidence has further shown, the creditors here have given up some right—maybe they could have easily insisted—to the proceeds of liquidation, at least from the inventory.

What will it be used for?

It will be utilized to insure that 100 cents on the dollar of these benefits will be paid to these employees.

[14]

What else?

100 cents on the dollar from the sale of the equipment, for lack of a better word, fixtures, will be used to refurbish and enlarge the stores that will continue to exist so that it will further insure the continued existence of jobs.

It is inconceivable that unless this Court is to totally disregard the best interest of the employees of Allied as well as the employees of Borman and Chatham, that if this Court is to protect and look out for that interest, this Court is compelled on the basis of the record before it, from the testimony before it, to reject.

The Court can well understand how the other parties to this multiple bargaining unit would oppose the rejection.

The Court can't conceivably, and some of the testimony has suggested that their position in the market place could well be improved by the elimination of Allied.

But, again, I must caution all that the primary function and responsibility of this court in any of the chapter proceedings is the protection and the rehabilitation of debtors.

[15]

If Congress had intended for everyone who found themselves in financial difficulty to be adjudicated and liquidated and thrown out of business, the Congress would have written Sections 1 through 7 of the Bankruptcy Act and closed the book and that would have been it.

But in going further, Congress expressed the policy with regard to the economic vitality of this country and it established the bankruptcy court and instructed them that it is the will of Congress, subject to the powers and direction set forth in this Bankruptcy Act, that they be utilized and to try to rehabilitate businesses.

That is a policy of Congress and only in rare circumstances does Congress override that policy.

And then when Congress does override it, it does it expressly. It does not do it by innuendo and leave it to guess work.

The Court concludes that both the law and the evidence adduced in these proceedings constrains the Court to hold and to grant the request to reject the executory contracts set forth in the petitions filed before this Court.

MR. AUGUST: Will the Court sign an order [16] to that effect?

MR. SOMMERS: Your Honor, just for clarity, are you rejecting the multi-employer contracts?

MR. AUGUST: That is not an issue before the court.

MR. SOMMERS: Because we tried—

THE COURT: That is not in issue, sir.

MR. AUGUST: I will present it to the Court, if the Court please.

THE COURT: I might add that any ruling is without prejudice to the right—

MR. DRIKER: Pardon me?

THE COURT: Any ruling—I may add this is without prejudice. I think I have already said this in effect that it is without prejudice to the right of Borman and Chatham to proceed to gain redress of any rights that it might have.

I don't think that this is the proper forum.

If you claim to have suffered injury as a result of the rejection, the proper thing is to file a claim and come forth in the proceeding.

Mr. August, I would require that the order to state the very, very minimums in that and, also, in balancing the equities, that it is in the best interest [17] also of the employees of the collective bargaining units which includes employees, the aggregate employees of all of these entities.

MR. SOMMERS: Your Honor, may we request respectfully a stay until we can perfect our next step?

THE COURT: Sir, I think in view of the nature and the testimony that I have had before me, the losses being suffered by this business, I think you should do that formally and give the Debtor an opportunity.

I'm sure that they will demand and the Court will have to consider whether or not there should be a supersedeas bond.

Hearing re Entry of Order

UNITED STATES OF AMERICA
IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION
IN BANKRUPTCY

In the Matter of: ALLIED SUPERMARKETS, Inc., a Delaware corporation, *Debtor-In-Possession.*	In proceedings for an arrangement under Chapter XI. No. 78-92871-H

HEARING re ENTRY OF ORDER

Proceedings had in the above-entitled matter before the Honorable Harry G. Hackett, Bankruptcy Judge, at Detroit, Michigan, on Monday, April 2, 1979, commencing at 10 o'clock A.M.

APPEARANCES:

IRVING A. AUGUST, Esq., and
SHELDON S. TOLL, Esq.,
Attorneys for the Debtor corporation.

EUGENE DRIKER, Esq.,
Attorney for Borman's, Inc.

— — —

[2]

Detroit, Michigan
Monday, April 2, 1979
10 o'clock A.M.

— — —

THE COURT: This is a hearing on the presentment of an order.

Both counsel would like to have some statements put on the record.

MR. DRIKER: Eugene Driker on behalf of Borman's, Inc.

At the conclusion of the hearing on Saturday evening—

THE COURT: I would have no objections, sir, if you are authorized, you can speak on behalf of—

MR. DRIKER: Chatham?

THE COURT: Chatham, yes.

MR. DRIKER: Mr. Handler, counsel for Chatham, is not going to be here this morning and he authorized me to speak on his behalf.

At the conclusion of the court hearing Saturday evening when the Court granted the applications of the debtor to reject the executory contracts, Mr. Sommers questioned the Court as to precisely what contracts are being rejected and I believe the Court stated in open court that it was granting the [3] applications of the debtor. Those applications make reference to specific contracts.

And the proposed order which Mr. August and Mr. Toll presented to the Court this morning makes no mention of exactly what collective bargaining agreements are being rejected.

I take it from what the Court's comments were on Saturday that all the Court is ruling upon is the application of the debtor and is granting that application and I think that the order should so state.

THE COURT: I think the order does state that.

The order states "the matter having come on to be heard on the applications of the debtor in possession to reject executory collective bargaining agreements with the Retail Store Employees Local 876, Retail Clerks International Association, AFL-CIO, Retail Clerks Local 36, the Retail Clerks Amalgamated Meat Cutters and Butcher Workers of North America, Local 539, AFL-CIO".

This is all that the Court is ruling.

MR. AUGUST: May it please the Court, I think—let me just respond to Mr. Driker.

MR. DRIKER: Before you respond, let me finish, please.

The operative paragraph of the order, second paragraph, where it says: "It is hereby ordered that the [4] collective bargaining agreements with Local 539 of the Amalgamated Meat Cutters with Local 36, the Retail Clerks Local 876 of the Retail Clerks are hereby rejected" et cetera.

My point is that there were a variety of documents introduced on Saturday and the Court never made a factual finding or conclusion of law as to what the contracts were.

I take it that when the Court in issuing its Opinion said that the applications are being granted assumed that that was a finding that the applications of Mr. August correctly set forth the contracts that he was trying to reject.

All I want is a confirmation of the Court that it is granting no relief different than that which was applied for.

MR. AUGUST: May it please the Court, it is true that we filed an application. We felt we had one contract.

Testimony of the union leaders was taken and the testimony from Mr. Smith was taken. Other witnesses were taken that the contract may encompass a numerous amount of documents.

Our position is that the Court doesn't have to make a factual determination which individual document it is rejecting.

The Court is merely rejecting whatever contract exists between the debtor and those unions. That's what the order says. Whatever the contract is, it is rejecting it, and it doesn't have to say the contract is this document, plus [5] this one plus that one plus something else. Whatever the contract is, it is rejected.

THE COURT: Absolutely.

MR. DRIKER: Then that is different from what the Court said on Saturday when Mr. August or when Mr. Sommers asked the Court: What about the multi-employer bargaining agreement?

And the Court said that is not before it.

THE COURT: That is correct. I still say that.

I have no application on behalf of anyone to reject any multi-bargaining—

MR. DRIKER: Contracts.

THE COURT —contracts. That wasn't before me.

MR. DRIKER: It would seem to me what the Court should state in this order is that the Court is granting the application of the debtor. It is not dealing with any other contractual arrangements beyond that, your Honor.

THE COURT: Mr. Driker, a court only speaks through its orders and that is all that this order says.

And if the Court intended to encompass anything else, the Court would certainly put it in there and some of the other statements—whenever congress wants to do something, congress does it.

And if congress doesn't want to do anything, congress keeps its mouth shut.

[6]

Now, you know, we have although I have—I am not very smart, but at least these lawyers that draw these orders, when they prevail, know what I intend and I made it very clear Saturday afternoon or evening, whichever one it was, that any order in conformity with the Court's ruling from the bench would be entered by the Court.

I find that this order is in conformity with the Court's ruling.

MR. DRIKER: But do I correctly understand that the Court's understanding of the order it is about to enter is that it deals only with the applications which were filed by the debtor and no other issue?

THE COURT: That is absolutely right, sir.

MR. DRIKER: Thank you.

THE COURT: That is absolutely right. There is never any question in my mind about that.

MR. DRIKER: Thank you.

THE COURT: And please don't think that I am complaining, Mr. Driker. I am satisfied that unless but for the skill, the diligence and the intelligence of all counsel, this matter could have turned out to be a lot—it was very difficult but it could have turned out to be unpleasant and it

was not unpleasant at all, despite the fact that some of the gentlemen who do not appear before me as often may have thought that I [7] was upset. That is my way of expressing myself. I can't help that.

I was never upset for one moment and it was indeed—if there are any such things as difficult and tiresome legal proceedings where I have to rule about somebody being a pleasure, all of those proceedings were pleasurable and it was because of the caliber, the attention and the courtesy and all that counsel extended to the Court.

MR. DRIKER: I would like to say to the Court that we appreciated the Court giving us the time and the patience and working on the weekend.

And as I just told Mr. August, I don't litigate with him very often over here, once every eight years it seems, on weekends, but I enjoy it.

THE COURT: I think that it was something that should have been gotten out of the way because as you see this morning, and the rest of the week, and every other time, I have got something else and that's the explanation for it.

MR. DRIKER: May I add just one more statement for the purpose of the record, that I have requested in this proposed order that the Court insert a statement that it is granting only the application of the debtor, that the Court has seen fit not to grant my request because it believes the order says that.

[8]

THE COURT: I think that the order says that, that anything that the order omits and does not say isn't included.

MR. DRIKER: Thank you, your Honor.

THE COURT: I don't think you have to be negative like saying "I am not going to give you no nothing".

MR. DRIKER: I appreciate that. Thank you very much.

— — —

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the matter of:
ALLIED SUPERMARKETS, INC., No. 78-92871-H
a Delaware corporation.

ORDER REJECTING, AS BURDENSOME TO THE ESTATE, EXECUTORY COLLECTIVE BARGAINING AGREEMENTS WITH LOCAL 539 OF AMALGAMATED MEAT CUTTERS AND LOCALS 36 AND 876 OF RETAIL CLERKS

At a session of said Court held in the Federal Building, at the City of Detroit, Wayne County, State of Michigan, on , 1979

PRESENT:
Bankruptcy Judge

This matter having come on to be heard on the applications of the Debtor-In-Possession ("DIP") to reject executory collective bargaining agreements with Retail Store Employees Union Local No. 876, Retail Clerks International Association, AFL-CIO ("Retail Clerks"), Local 36 of the Retail Clerks, Amalgamated Meat Cutters and Butcher Workmen of North America, Local 539, AFL-CIO ("Amalgamated Meat Cutters"), and objections to said applications to reject having been filed by Borman's, Inc. and Chatham Super Markets, Inc., and no objection having been made by the Retail Clerks or Amalgamated Meat Cutters, and trial having been held on the applications to reject and it appearing to the Court that said collective bargaining agreements are burdensome to the DIP, and the Court having weighed the equities and having found that rejection is in the best interest of the bargaining units here in question,

IT IS HEREBY ORDERED that the collective bargaining agreements with Local 539 of the Amalgamated Meat Cutters, with Local 36 of the Retail Clerks, and with Local 876 of the Retail Clerks are hereby rejected as burdensome to this estate and the DIP is hereby relieved of any and all liability in conjunction with said contracts.

Court of Appeals Judgment

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 80-1785

BORMAN'S, INC.,
Plaintiff-Appellant,

vs.

ALLIED SUPERMARKETS, INC.,
Defendant-Appellee.

JUDGMENT
(Filed: May 11, 1982)

BEFORE: LIVELY and JONES, Circuit Judges, and CELEBREZZE, Senior Circuit Judge.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, *Clerk*

REIssued as Mandate: July 14, 1983

COSTS: Appellee to Recover

Filing fee	$	
Printing	$264.00	A True Copy.
Total	$264.00	Attest:

(s) Linda L. Brinson, *Deputy Clerk*

Application to Reject and Notice of Hearing

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the matter of:
ALLIED SUPERMARKETS, INC., No. 78-92871-H
a Delaware corporation,
Debtor

NOTICE OF HEARING AND APPLICATION FOR AUTHORITY TO REJECT EXECUTORY CONTRACT

TO:

Horace Brown, President
Retail Store Employees Union
876 Horace Brown Drive
Madison Heights, Michigan 48071

Theodore Sachs, Esquire
Marston, Sachs, Nunn, Kates,
Kadushin & O'Hare, P.C.
1000 Farmer Street
Detroit, Michigan 48226

Irving A. August, Esquire
August, Thompson, Sherr, Clarke
& Schaefer, P.C.
555 S. Woodward, Seventh Floor
Birmingham, Michigan 48011

Stuart E. Hertzberg, Esquire
Hertzberg, Jacob & Weingarten
1530 Buhl Building
Detroit, Michigan 48226

Please take notice that the below Application for Authority to Reject Executory Contract will come on for hearing before the Hon. Harry G. Hackett, Bankruptcy Judge, in his courtroom in the United States Court House, Detroit, Michigan, on Monday, March 26, 1979, at 10:00 a.m. or as soon thereafter as counsel may be heard.

APPLICATION

The Debtor and Debtor-In-Possession state:

1. On or about July 5, 1977, effective March 27, 1977 the Debtor, as Employer entered into a union labor agreement with Retail Store Employees Union Local No. 876, Retail Clerks International Association, AFL-CIO terminating March 22, 1980.

2. The continuation of said labor agreement would be burdensome if permitted to continue, would be detrimental to the Debtor and its creditors and the agreement should be rejected forthwith.

WHEREFORE, applicant prays that an order be entered authorizing the Debtor-In-Possession to reject said labor agreement.

HONIGMAN MILLER SCHWARTZ AND COHN
Attorneys for Debtor and Debtor-In-Possession
BY: (s) Sheldon S. Toll (P-21490)
2290 First National Building
Detroit, Michigan 48226
962-6700

Dated: March 23, 1979

Application to Reject and Notice of Hearing

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the matter of:
ALLIED SUPERMARKETS, INC., No. 78-92871-H
a Delaware corporation,
Debtor

NOTICE OF HEARING AND APPLICATION FOR AUTHORITY TO REJECT EXECUTORY CONTRACT

TO:

David Jarvis, President
Retail Store Employees Union
Post Office Box 2624
Kalamazoo, Michigan 49003

Irving A. August, Esquire
August, Thompson, Sherr, Clarke & Schaefer, P.C.
555 S. Woodward, Seventh Floor
Birmingham, Michigan 48011

Theodore Sachs, Esquire
Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.
1000 Farmer Street
Detroit, Michigan 48226

Stuart E. Hertzberg, Esquire
Hertzberg, Jacob & Weingarten
1530 Buhl Building
Detroit, Michigan 48226

Please take notice that the below Application for Authority to Reject Executory Contract will come on for hearing before the Hon. Harry G. Hackett, Bankruptcy Judge, in his courtroom in the United States Court House, Detroit, Michigan, on Monday, March 26, 1979, at 10:00 a.m. or as soon thereafter as counsel may be heard.

APPLICATION

The Debtor and Debtor-In-Possession state:

1. On or about July 5, 1977, effective March 27, 1977 the Debtor, as Employer entered into a union labor agreement with Retail Store Employees Union Local No. 36, Retail Clerks International Association, AFL-CIO terminating March 22, 1980.

2. The continuation of said labor agreement would be burdensome if permitted to continue, would be detrimental to the Debtor and its creditors and the agreement should be rejected forthwith.

WHEREFORE, applicant prays that an order be entered authorizing the Debtor-In-Possession to reject said labor agreement.

HONIGMAN MILLER SCHWARTZ AND COHN
Attorneys for Debtor and Debtor-In-Possession
BY: (s) Sheldon S. Toll (P-21490)
2290 First National Building
Detroit, Michigan 48226
962-6700

Dated: March 23, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the matter of:
ALLIED SUPERMARKETS, INC., a Delaware corporation,
Debtor

No. 78-92871-H

NOTICE OF HEARING AND APPLICATION FOR AUTHORITY TO REJECT EXECUTORY CONTRACT

TO:

Richard J. Phillips, President
AMC 539, 30800 Montpelier Drive
Madison Heights, Michigan 48071

Irving A. August, Esquire
August, Thompson, Sherr, Clarke & Schaefer, P.C.
555 S. Woodward, Seventh Floor
Birmingham, Michigan 48011

Ted Iorio, Esquire
3161 N. Republic Boulevard
Toledo, Ohio 43613

Theodore Sachs, Esquire
Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.
1000 Farmer Street
Detroit, Michigan 48226

Stuart E. Hertzberg, Esquire
Hertzberg, Jacob & Weingarten
1530 Buhl Building
Detroit, Michigan 48226

Please take notice that the below Application for Authority to Reject Executory Contract will come on for hearing before the Hon. Harry G. Hackett, Bankruptcy Judge, in his courtroom in the United States Court House, Detroit, Michigan, on Monday, March 26, 1979, at 10:00 a.m. or as soon thereafter as counsel may be heard.

APPLICATION

The Debtor and Debtor-In-Possession state:

1. On or about June 6, 1977, effective April 10, 1977 the Debtor, as Employer entered into a union labor agreement

with Amalgamated Meat Cutters and Butcher Workmen of North America Local 539 AFL-CIO terminating April 12, 1980.

2. The continuation of said labor agreement would be burdensome if permitted to continue, would be detrimental to the Debtor and its creditors and the agreement should be rejected forthwith.

WHEREFORE, applicant prays that an order be entered authorizing the Debtor-In-Possession to reject said labor agreement.

HONIGMAN MILLER SCHWARTZ AND COHN
Attorneys for Debtor and Debtor-In-Possession
BY: (s) Sheldon S. Toll (P-21490)
2290 First National Building
Detroit, Michigan 48226
962-6700

Dated: March 23, 1979

Hearing on Motion to Intervene
March 26, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the matter of:
ALLIED SUPERMARKETS, INC., No. 78-92871-H
a Delaware corporation,
Debtor

MARCH 26, 1979 HEARING ON MOTION TO INVERVENE

[26]

. . .

MR. AUGUST: [Allied's lawyer]: May it please the Court, this Association, this document is signed as counsel indicates. But each individual employer must sign its own agreement.

Borman has a signed contract with these unions, we have a signed contract with these unions. We are prepared to introduce them today.

And it is these signed contracts with the unions that we proposed to reject.

. . .

Hearing–March 30-31, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the matter of:
ALLIED SUPERMARKETS, INC., No. 78-92871-H
a Delaware corporation,
Debtor

MARCH 30-31, 1979 HEARING

[6]

. . .

MR. COLEMAN: I am Jerome Coleman and we represent Teamsters Local 337, parties who have a contract with Allied Supermarkets.

For the Court's edification, your Honor, I have been asked by my client to notify the Court in respect to the application before the court to reject certain collective bargaining agreements, one of which is not the collective bargaining agreement or collective [7] bargaining agreements with Local 337.

On March 28, 1979, Local 337 which bargains for approximately 500 employees of Allied Supermarkets sent a letter to Earl W. Smith, Chairman of Allied Supermarkets, indicating that the collective bargaining agreements between Local 337 and Allied remained in full force and effect and without change and that the union also demanded an enforcement of those collective bargaining agreements in respect to all of their terms.

I merely wish to advise the Court that at least presently it is the position of Local 337 that all five of its collective bargaining agreements will remain in full force and effect without change.

The recent vote that the Court may have had notice of was advisory in nature only.

The executory board, which is the ruling body of the Local, has not met to approve or disapprove the vote of its counsel.

THE COURT: Well, I don't want to interrupt you—I don't want to interrupt you, but is there an application before the Court to reject these?

MR. AUGUST: No, there is not.

THE COURT: Well, you see, just so that we don't get confused.

[8]

MR. AUGUST: We have no objection if counsel will complete his statement, your Honor.

THE COURT: Well, all right. I don't want to make anything tough for you.

All right. Go ahead.

MR. COLEMAN: I merely wish to indicate to the Court that if in fact as we know the law to be under the collective bargaining agreements between Local 337 or any other union, if in fact this Court should decide to reject those agreements, one of the options available to Local 337, and of course the other unions is to immediately demand negotiations with respect to those agreements and, if necessary, strike in support of those demands.

In that case, we are merely indicating to the Court that in the opinion of the union, at least that I represent, it would be extremely unwise to do so at this time because this certainly would affect the rights of our members.

THE COURT: Well, sir, I don't go out and grab people and bring them in here to present matters to me.

They haven't brought a petition before me to reject your contract.

When they do, I will decide it.

[9]

And until they do, I am not even interested in it.

All right?

. . .

Hearing–March 30-31, 1979

[48]

. . .

Q. [by Mr. August] Now, did you make any commitments to the union leadership who was present at that meeting and whose contracts we seek to terminate today?

What would happen in the event you could [49] not get all employees to agree to the proposal?

A. [by Allied's Chairman] Yes.

Q. What is the commitment you made?

A. The commitment is that the plan is made up of varying components and all components must fall in place. There can be no back out of fallback position.

This is the only plan that the test that we went through would allow Allied Supermarkets to survive.

Q. Mr. Smith, although we are only seeking the rejection of three contracts today, is it your understanding that no implementation of concessions by any union will be put into full force and effect, even if the Court allows the rejection of these contracts unless you have the commitment of all employees of the company to participate in the concessions you have outlined?

A. That is correct.

Q. In other words, it is an all or nothing?

A. It is all or nothing.

. . .

[66]

. . .

BY MR. DRIKER:

Q. Mr. Smith, as I understand your direct testimony, it is your opinion as the chief executive officer of Allied and as the Court's designated agent for the Debtor in Possession that in order for the business plan to be implemented and ultimately for a plan of arrangement to be effectuated, there has to be a modification of all of the labor contracts to which Allied is a party.

A. [By Allied's Chairman] That is correct.

Hearing–March 30-31, 1979

[67]

Q. And that includes not only the three labor contracts which are specifically the subject of this hearing today, but any other labor contracts as well?

A. That is correct.

Q. And that would include more specifically contracts between Allied and Local 337 of the Teamsters.

A. That, and others.

Q. And others.

So that your statement is that all of these contracts have to be modified in order for the plan of arrangement to go forward?

A. Yes.

Q. Now, as I understand your direct testimony, the rejection of these contracts by the Bankruptcy Court is only one part of the overall effort to modify, isn't that so?

A. The rejection of the contracts that are being decided upon today, yes.

Q. Well, you have just testified a question or two ago that all of the contracts would have to be modified ultimately.

A. Yes.

Q. For the business plan to succeed?

A. Yes.

Q. I take it that means that at least all of them would have to be rejected in order to be modified?

. . .

[140]

Q. You would agree that the purpose of a multi-employer bargaining group is to protect the participants against the eventuality that one company will obtain a better labor contract than its competitors, that's the purpose of it?

A. That would be one of the purposes, yes.

Hearing–March 30-31, 1979

. . .

[192]

. . .

Q. (By Mr. Driker) Tell us how the ratification votes took place in 1977?

A. [By Retail Clerks President] Well, we held one employer-group at a time.

We had an A.M. meeting for the night crew and a P.M. meeting for the day crew and each group was advised that their votes would be counted by committees selected out of that group, but would be tabulated with the meetings of those of the next two days that followed.

We had three different days for the three different employer groups, all conducted in the same manner.

All votes were tabulated to give the results of that ratification.

Q. The votes were tabulated as one?

A. That's right.

[193]

Q. In order to determine ratification?

A. Right.

Q. Is that because all of the employees of Allied, Borman and Chatham that are covered by that contract are deemed part of one bargaining unit?

A. That is my opinion, yes.

. . .

[203]

. . .

This is my opinion as to why you have an association. You don't get cut up and caught up in a buzz saw situation.

Q. [By Mr. Driker] Would it be fair to say that, to state it differently, that one employer doesn't get a competitive advantage in labor cost over another?

A. That, too.

Q. And then isn't the term in the labor field being "whip sawed"?

A. "Whip sawed".

Q. They don't want to be "whip sawed", isn't that right?

A. Right.

Q. Is it your belief that the contracts which 876 has negotiated with the U.S.A. over the years, in fact, served that purpose which you just described?

A. It has.

. . .

[233]

. . .

MR. DRIKER: I will offer Exhibit 19.

MR. AUGUST: May it please the Court, I think it is immaterial. It deals with the Teamsters.

And as of this minute, we are not seeking to reject any contract of the Teamsters.

THE COURT: Mr. Driker?

MR. DRIKER: I think Mr. Smith indicated, your Honor, that the business plan rises and falls as a [234] unit and that, therefore, it is encumbent upon Allied to obtain concessions from the Teamsters and I think that this letter indicates that the Teamsters are, at least at this point, have not given any consideration—

THE COURT: If that is your offer of proof, the Court will sustain the objection.

. . .

[298]

. . .

Q. (By Mr. Fishman) Dr. Kahn, would you tell us from an industrial relations and labor economics standpoint what are the purposes served by multi-employer bargaining leading to an association master contract?

A. Well, this kind of bargaining arrangement generally emerges because it serves the interest of both the union and unions involved and employers that are involved.

I think as a generalization applying to many different kinds of situations, you would expect to find multi-employer bargaining developing most commonly where there is a fairly large number of firms of plants, large number of employers, who are rather intensely competitive.

And by intensely competitive, I would emphasize most typically a lack of significant product differentiation so that the consumer can be reasonably fickle in addressing himself or herself for example, to price and the price considerations as distinct from loyalty to one firm.

[299]

In any event, with the high degree of active competition among firms that are similar in terms of what they offer and usually where there is a high proportion of labor costs or labor costs are a high proportion of operating costs, going along with this would be the general likelihood that capital requirements would be low.

And this kind of industry is relatively easy to enter and may be easy to exit from which would tend to be the kind of situation where you would typically find multi-employer bargaining developing, assuming, of course, that a union has organized the employees in this category.

. . .

[301]

. . .

Remember, this is an intensely competitive industry and any one employer would be very much concerned about a strike that would permit its competitors in effect to take over that market, acquaint consumers for the first time with the fact that there are some other stores here.

To use a retail example, that there are some other stores that are pretty good also at this kind of thing.

I might say, too, that very often because there are many firms available to the consumer and because what is very

often offered, the kind of product of service, which is perishable, in this instance it is not offered, it is going to be sold later.

If a newspaper struck, it can't print extra editions later on and sell them.

If a supermarket is struck or a supermarket chain, it is just going to lose sales to other supermarkets during that period of time. There is no advance build-up of inventory that can be used to supply customers during a strike, that kind of a situation.

Actually, the consequence of this, you have a [302] much less likelihood of strike and it's the important motivation of employers really to reduce the likelihood of a strike, the unions are going to have to strike everybody and that multi-employer union, that is a much more costly undertaking for a union to seriously consider doing.

And, of course, to tie this into my first point, the typical employer knows that at least all of the competitors are having to incur or suffer, if you like, the same labor costs as they are so that there will not be the kind of competition that can result form lower employment standards and savings in that direction.

Most employers in multi-employer arrangements believe that they result in better employee satisfaction.

The employees are aware that in that contract area, that they are covered by the contract. Basically everyone else's terms and conditions of employment are the same as in this establishment which removes a source of discontent.

You also have long periods of relative stability, that is, during the life of an existing contract.

Whereas if you actually have individual company bargaining, there would always be times within the industry in the area among these competitors where there would be strike deadlines, perhaps strikes, all kinds of [303] things would be going on so that there would be more of a continuously or frequently disturbed environment as against this and there could result from this, say, a two or three year contract, for example, establishing the situation—

. . .

[304]

A. [By Dr. Kahn] Another advantage of multi-employers bargaining from an employer's point of view is that it can frequently produce and the importance varies with the situation, much more efficient and economical negotiations of contracts as a sort of a general saving of overhead.

Now, I have been outlining the advantages to employers as I see them in general. I have not referred to unions.

Q. With respect to the other participants, namely, the labor side of the ledger in multi-employer bargaining, or, let's say, direct—I withdraw that.

With respect to employees which is, after all, what the bargaining has to do with, what are the purposes served in multi-employer bargaining to a master contract with respect to them?

A. Certainly the union. I am talking now about the union that negotiates with employers as a group, either all of the employees or some bargaining unit of employees for the union, there is for its members the achievement of the same thing I mentioned before, that is, its members, and the same terms and conditions of employment.

There is a period of stability.

[305]

There is much less dissension among the members now that everybody in that competitive industry situation is being employed on the same basis.

There is the economy of union staff time and from a point of view of the members might even mean lower dues.

A very important advantage to the union is that in general they will be much—there will be much better policing of agreement, much less likelihood that violations of the agreement by any of the employers will be detected.

Some time employer associations play an important role there.

There are some situations where a union is trying to deal with employers, one at a time, and the employer says that I can't give you more than you agreed upon with my competitor.

To the multi-employer union it tends to produce elimination, shall I say, of the most favored employer treatment, shall I say.

The only other significant point, unions like this, also, because it can provide protection against raiding.

. . .

[336]

. . .

A. Now, on the other hand, obviously the rationale of the multi-employer agreements and as I have inferred from what I have heard here today of a close pattern following of the multi-employer agreement by A & P and Kroger's is precisely to generate a certain type of [337] stability that can be achieved only through uniform terms, this kind of stability I think could be seriously jeopardized by—well, it would in effect, I suppose, by a subsidization, by a subsidization of Allied through lower wages and fringes that would break up the historic uniform package.

Now, I can—I hesitate and I will not attempt any very specific position because Mr. August is entirely right. I have not made a detailed study of the Allied situation or of the economics of a supermarket industry in Detroit and so forth.

I am here only as a specialist in my own view, really, on collective bargaining and the associated labor economics.

Having made that point, I could foresee a situation in the face of very high labor costs prevailing in the industry that a significant reduction in those costs on the part of one of those chains could have significant repercussions in the ability of the competitors to compete if they permit it.

In otherwords, if Allied stores in any way to achieve lower prices, the fickle consumer can very readily transfer his and her business to the supermarket that offers lower prices.

And if those lower prices are achieved [338] through lower labor costs, then the industry as a whole is paying, that can seriously disrupt the whole pattern of collective bargaining in the industry.

It might adversely affect labor standards achieved in the industry as a whole in the Detroit area.

. . .

[344]

. . .

MR. DRIKER: Your Honor, I think the Court would be making a fundamental error if before the close of proofs and argument, if it did not allow the witness to answer this question.

What the Court is going to have to decide is what is the contract in this case and who are the parties to that contract.

That is a matter that is not decided yet.

If it decides that the only parties to the contract are Allied and their respective unions, then this question is relevant.

If on the other hand the Court holds as we think it should that the parties to the contract are the members of the United Supermarket Association who signed a single memorandum of agreement with the unions, then this [345] question is very relevant.

THE COURT: Sir, not for one moment is this Court concluding and making a ruling by excluding this testimony that Borman, Chatham, Kroger and everybody in the industry is not adversely affected.

I am not concluding that by making that ruling.

There are other remedies for redress if they are adversely affected.

It doesn't permit this Court to go outside the limits of the matters that it can take into consideration and in reaching a proper conclusion as to whether or not these contracts should be rejected.

That's all.

The Court's ruling is that limited.

MR. FISHMAN: Your Honor, could I—

MR. DRIKER: Let me finish my statement, please.

The key issue, the key issue under 313 of the Bankruptcy Act is balancing the equities among the parties to the contract.

You haven't made that decision yet as to who the parties to the contract are.

. . .

[347]

The statute talks about the consequences to the parties to the contract.

You haven't ruled yet who the parties to the contract are.

THE COURT: Sir, that is not necessary for me to make a ruling on that at this time in order to rule on the evidence.

MR. DRIKER: I would urge that we make a separate record on this question.

I would certainly make an offer of proof.

MR. AUGUST: I have no objection to the separate record, your Honor.

And if, in fact, at the conclusion of the separate record, even though the same trier of fact is hearing it, and usually this is prevalent in jury cases.—

THE COURT: You may make a separate record.

I certainly will grant that. I am not going to be that arbitrary.

Gentlemen, every point you are attempting to make, I want you to think that I am not considering—I am looking all the time.

We will receive the testimony and make a separate record.

[389]

. . .

A. [By Dr. Kahn] The difference here between a very short term situation and a slightly longer run situation, I

don't think that an enterprise of this kind in a highly competitive kind of industry would be likely to survive very long at significantly sub-standard rates of pay because it wouldn't be able to, for example, hold on to good employees.

Nor do I think realistically that a union that represents all the employees against the industry could tolerate or would tolerate realistically, in effect, the subsidization of this particular employer's problem, how they originated through sub-standard wages.

. . .

Letter to Allied Supermarkets (Proposed Exhibit 19)

Food and Beverage Drivers,
Warehousemen & Helpers Local Union No. 337

AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA
2825 TRUMBULL AVE., DETROIT, MICH. 48216
WOodward 5-9833

ROBERT HOLMES
PRESIDENT

March 28, 1979

Allied Supermarkets
12365 Merriman
Livonia, Michigan 48150

Attn: Earl W. Smith

Dear Sir:

The labor agreements between Local 337 and Allied Supermarkets are in full force and effect and Executive Board of Local 337 has never authorized any freeze of wages or modification or termination of these contracts. We demand enforcement of this on behalf of our members including all contract terms, wages and all other benefits.

Sincerely yours,

(s) Lawrence Brennan
Vice President
Teamsters Local 337

LB:c

DEPOSITION OF LAWRENCE BRENNAN

. . .

Q. Now, can you tell me, Mr. Brennan, what happened between April 6 and June 11, 1979, which caused the change in the position of Local 337 with respect to Allied's contract?

A. Off the top of my head, I believe that after we had originally made a decision to stand fast with the terms of our contract, a petition, I believe, was forwarded to us by the majority of the membership at that time pleading to reconsider the position we had taken. That is what brought all of this about.

Q. Was there any contact by the Retail Clerk's Union with Local 337 with respect to modification of your contract?

A. Not to my knowledge.

Q. Was there any contact by the Bankruptcy Court or any officers of the Bankruptcy Court with Local 337 with respect to modification of the contract?

A. I would have to say, no, except, possibly in a couple of meetings that were held where the Judge was present. Outside of that, I have to say no.

Q. Which Judge was that?

A. Judge Hackett.

Q. Could you tell us where those meetings took place?

A. Well, one was here at the Union Hall. I don't know what the date is. That was originally the first meeting. That was with basically all the union stewards or committee people who were involved.

Q. Would that have been after April 6 but before June 11?

A. Yes.

Q. And that was a meeting here at 2825 Trumbull, the Teamsters' headquarters?

A. No, it would have been at the insurance office. I don't know what the address is.

Q. Next door?

A. Health and Welfare Building.

MR. HOLMES: 2700.

Q. (By Mr. Driker): Who called that meeting, do you know?

A. I don't know.

Q. Was it in the daytime or in the evening?

A. It was in the daytime.

Q. This was a meeting of the stewards who represented Allied employees?

A. Yes.

Q. Judge Hackett was in attendance?

A. Yes.

Q. Were there any representatives of Allied Supermarket there?

A. I believe there were three people present.

Q. From Allied?

A. Yes.

Q. Do you recall who they were?

A. One was Mr. Smith.

Q. That is Earl Smith?

A. Yes.

. . .

Q. (By Mr. Driker): Mr. Brennan, you were listing the representatives of Allied who were present at the meeting. You mentioned Mr. Earl Smith, the Chairman of Allied?

A. He was present. Mr. Martin was present, Chuck Martin.

Q. That is Charles Martin, the labor Vice-President?

A. Yes. And an attorney, I don't know the fellow's name, young fellow, fairly slender.

Q. This was an attorney representing Allied?

A. I am assuming he was.

Q. Could it have been David Mikesell? Kind of angular face, fair haired?

A. He was a young fellow, fair haired, I don't know what his name was.

Q. Do you know what time of day that meeting took place?

A. Rough guess, it had to be mid morning, 10.

Q. Were you present at the meeting?

A. Yes.

Q. For the entire meeting?

A. Yes.

Q. Do you know how long that lasted?

A. Approximately three hours, two hours and 45 minutes, I would say, in that area.

Q. Were you present for the entire meeting?

A. Yes.

Q. Was Judge Hackett there for the entire meeting?

A. Yes.

Q. Were Mr. Smith and Mr. Martin there for the entire meeting?

A. They may have been, went out in the hall for a few minutes. I would say they were there for the entire time.

Q. How about the attorney?

A. Yes.

Q. How many Local 337 representatives were there?

A. I would have to take a guess at that. I would have to say maybe—if you are talking about the union stewards.

Q. Yes.

A. The union people?

Q. Yes.

A. Oh, boy, 15. Give or take a few, it could be more or less, you know.

Q. Was there anybody else represented there besides the union, Allied, Judge Hackett?

A. Just the three parties, the stewards, agents and the company.

Q. Was it an open meeting, could anybody walk in who wandered by?

A. No.

Q. Do you know who invited the Judge or how he happened to get there?

A. I would have to say no.

Q. Did the Judge speak at all during the course of the meeting?

A. Yes.

Q. Could you tell me what he said?

A. I think the Judge was asked to give his views of what Chapter 11 or 13, whatever chapter they were in. The stewards asked him different questions about bankruptcy law.

Q. Did he make a presentation before being asked, in other words, did he make a statement at the outset or did he only respond to questions?

A. No, he was asked.

Q. He was asked questions?

A. Yes.

Q. And he answered them?

A. I would have to say that he did.

Q. What was the general purpose of the meeting? Why was the meeting called?

A. I think the purpose was that the people wanted to know whether they were going to be in business or out of business, where they stood on the totem poll when it came to creditors.

Q. Was Allied at that time through Messrs. Smith and Martin trying to convince the Teamsters to accept a modification of their contract?

A. I think that's the reason they were present. They were there also with some questions directed, to ask questions—or to answer questions basically from the membership that was present.

Q. The purpose of the meeting, as I understand the chronology of events, up to the date of that meeting Local 337 had not agreed to any modification of its contract, is that correct?

A. That's correct.

Q. The meeting was to try at least from the point of view of Allied to convince 337 to accept the modification?

. . .

THE WITNESS: At that time I really can't say yes to that.

Q. (By Mr. Driker): This was just a question and answer period?

A. The meeting was put to the point that these people we are asking questions of how they stood with the company, where they did stand and what was going to happen to them if bankruptcy continued to go. And these were the questions being asked of the Judge. To my knowledge they did not ask a lot of questions to the company.

Q. It was mainly to Judge Hackett?

A. Mainly to the Judge. Some questions were asked of the company, but not that many, most of them were directed to the Judge.

Q. Did he do most of the talking?

A. I would have to say yes.

Q. Did the attorney also speak, the attorney for Allied?

A. Very, very little.

Q. Was it an informal kind of a meeting?

A. Yes.

Q. Lot of back and forth conversation?

A. Yes.

Q. Did the Judge have any documents with him that he was referring to?

A. To my knowledge, I would have to say no.

Q. Had you ever met Judge Hackett before?

A. Personally, no, I saw him in a courtroom one day when I went with Mr. Coleman.

Q. Was this in an auditorium or just around the table?

A. It was in an auditorium.

Q. Was he sitting on the stage?

A. Originally, no. When he asked them questions, yes, he did go up.

Q. He went up on the stage?

A. Yes.

Q. Was there any meeting that took place with the Judge either before or after this larger meeting? In other words, was there any kind of introductory meeting or meeting with the officers or was it all together?

A. It was all together.

Q. How did the people refer to him, were they calling him Judge Hackett?

A. They called him Judge Hackett. He asked them, please, at that time because it was informal just call him Harry.

Q. Is that what the people did?

A. No.

Q. They still called him Judge Hackett?

A. Correct.

Q. Do you recall what kinds of questions were asked, any specific questions?

A. Oh, boy, there were just a lot of questions. When you get in that type of meeting, each person has his own ax to grind. The main thing is how would they stand with the continuation of bankruptcy, how would it affect them.

. . .